I. INTRODUCTION

The controversy over state management of subsistence hunting is one of Alaska’s most volatile political issues. Many urban sport hunters vehemently oppose giving subsistence hunting a priority over sport hunting. But, if urban sport hunters are upset about state hunting management, their concern is matched by subsistence hunters’ antipathy to state game regulations. Subsistence hunters residing in remote bush villages often find the state Board of Game insensitive and unwilling to write state game regulations adapted to their needs. Cultural differences between sport and subsistence hunters exacerbate the dispute, making difficult any political compromise on a single set of hunting rules acceptable to both hunting interests. Villages, therefore, are considering writing their own tribal hunting codes. The possibility of village self-regulation, especially through tribal governments over which non-Native sportsmen can have only indirect influence, greatly disturbs urban sport hunters. Yet, as this article demonstrates,
principles of federal Indian law authorize village tribal governments to undertake such regulation.

This article discusses the forces driving these remote villages to promulgate hunting codes and the legal framework surrounding the exercise of tribal jurisdiction over hunting. Specifically, the article first provides some factual background, describing remote villages in Alaska and the methods by which the state Board of Game currently writes game regulations applicable to such villages. The second section of the article briefly outlines relevant concepts of federal Indian law used to define the place of tribal governments in the United States' federal system. Then the discussion will turn to principles of federal Indian law defining the territorial jurisdiction of tribes and determining whether tribal law, supported by federal law, can preempt state law. The article will use these principles to determine whether Alaska tribal governments can enact game codes, the extent of lands where tribal game codes would apply, and whether such game codes would preempt state law. The fourth and final section will discuss some policy implications of tribal game management.

II. THE CURRENT SITUATION: REMOTE VILLAGES AND THE STATE OF ALASKA’S PROCEDURES FOR WRITING STATE GAME REGULATION

A. Remote Villages in Alaska

The socioeconomic system of the approximately two hundred remote Alaska villages differs substantially from that of mainstream American society. Although each remote village is unique, all share some generic characteristics: a strongly Native character, a mixed subsistence-based economy deeply dependent on fish and game to meet social and economic needs, and a complex of interlocking public governing institutions.
The first shared characteristic of the remote village is its strong Native nature, which permits Native traditions to endure. Most remote villages not accessible from the road network have a population that is ninety to ninety-five percent Native. Although naive outside observers sometimes lament the modern technology to which Native villagers have adapted with seeming ease, the use of modern technology masks the continuing vitality of traditional culture and values.

Another shared characteristic of the remote village is its "mixed subsistence-based economy." In this economy, substantial fish and game harvests are supplemented by limited participation in the cash economy. Job opportunities in villages are either short term and seasonal (for example, construction jobs on state-financed infrastructure projects) or poorly paid (for example, cooking in the schools, working as a part-time postmaster, or maintaining the village power plant). In some regions, commercial fishing provides an alternate way to earn substantial income without leaving the village and by using subsistence skills. In addition to paying for such basics as fuel oil and electricity,
money is invested in gear for subsistence hunting and fishing: boats, outboard motors, snowmachines, fishing nets, gasoline, etc. The cost of transporting goods to the villages is extremely high, and that cost is reflected in high village store prices. Therefore, it is more efficient to use earned money to purchase equipment for hunting and fishing than to buy food.

Each village follows its own "seasonal round" of subsistence activities, following a regular yearly cycle based on the local availability of fish and game. Within the seasonal round's general pattern, the amount of each subsistence species taken in any given year varies tremendously. This variation results from the fluctuation in the abundance and distribution of arctic fish and game and also because weather patterns (such as the amount of snow cover or ice conditions) may ease or block fishing and hunting access. The overall village harvest of all species is fairly level from year to year, with plentiful species substituting for those that are scarce in a given year. To compensate for large and unpredictable variations in individual species, the subsistence economy relies on a wide variety of fish and game, including in the seasonal round a large proportion of all available food species. Harvest levels, supplying most of the village's food, are quite high — running two or three pounds a day of fish and game per capita in many communities. These traditional patterns can only continue if villagers have unfettered access to multiple fish and game species throughout the year.

See, e.g., id. at 194-98. Id. at 239-43. See, e.g., 7 C.F.R. § 272.7(c) (1987); SUBSISTENCE IN SOUTHWEST ALASKA, supra note 3, table 27, at 151 (almost every village has at least one store, but stores tend to carry a limited stock of food, and sometimes they even run out of staples). SUBSISTENCE IN SOUTHWEST ALASKA, supra note 3, at 50. ADF&G HABITAT DIVISION, 2 ALASKA HABITAT MANAGEMENT GUIDE, ARCTIC REGION table 14, at 498 (1986) [hereinafter ARCTIC HABITAT GUIDE]; E. BURCH, SUBSISTENCE PRODUCTION IN KIVALINA, ALASKA: A TWENTY YEAR PERSPECTIVE 48-49, 51, 77-78, 112-13 (ADF&G Subsistence Division Technical Paper No. 128, 1985).

For instance, Burch relates how in one year a poor fall char fishery in Kivalina increased winter caribou hunting, id. at 77, and that in another year demand for caribou was increased by poor winter seal hunting. Id. at 77-78. Wolfe, Understanding Resource Uses in Alaskan Socioeconomic Systems, in COMPARATIVE COMMUNITY CASE STUDIES, supra note 3, at 261-62.

SUBSISTENCE IN SOUTHWEST ALASKA, supra note 3, at 351-58; E. BURCH, supra note 13, at 111 (harvest, in terms of production per capita per day, ranged from 4.6 to 6.97 pounds per person per day).
The activities involved in producing subsistence fish and game help to bind these small communities. People in the village join together to hunt or fish, and working groups form within the village along lines of family or friendship. Many subsistence activities require a complex division of labor in which each group member performs a distinct task. For instance, salmon fishing may require one person to set and pick a gillnet and others to cut the fish and hang it to dry. Subsistence roles within these groups differ with sex and age, and each person as he or she gains in age and experience assumes roles requiring greater skill and knowledge. Thus, involvement in fishing and hunting reinforces each person's identity within the family and the village community, and group-shared subsistence activities bind the families and the community together.

In addition to these ties created by cooperation in producing subsistence foods, use and distribution of fish and game also reinforce community ties and personal pride. Fish and game are shared according to traditional rules of fair distribution: with the production team members, with other extended family members, and with elders or other disabled persons unable to fish or hunt for themselves. Thus, distribution binds families together, creates networks reaching beyond families throughout the village, while at the same time providing a safety net for unproductive members of the village.

But subsistence hunting plays a role even more critical than providing remote villages with a viable economic base or establishing relationships among village members: it reaffirms for each hunter his identity within his cultural tradition.

17. E.g., Subsistence in Southwest Alaska, supra note 3, at 387-99, 410-13; Southwest Habitat Guide, supra note 6, at 590 ("Production and distribution of subsistence products are organized to provide for household or community security and for continued cultural existence rather than to maximize individual gain or greatest possible yield, given available labor and technology.").


19. E.g., D. Boeri, supra note 5, at 21 (gaining experience and changing roles within whaling crew).

20. Southwest Habitat Guide, supra note 6, at 602-03.

21. Subsistence in Southwest Alaska, supra note 3, at 378-429. People working together hunting and fishing each contribute transportation equipment, gear, and gasoline to the production group. Id.

22. Id. at 481-89 (outlines basic domestic organization).

23. Some households are much more productive than others, and in every village a few households produce substantially greater than average harvests and distribute the surplus to needy households. Id. at 351-57. The productive households are often, but not always, also high income households, endowed with monetary income, subsistence equipment, and hunting expertise. Id. at 450-81.

24. T. Berger, supra note 7, at 48-55; Southwest Habitat Guide, supra note 6, at 603.
(literally "real food" in Inupiaq Eskimo)—caribou, moose, seal, walrus, or whale muktuk—the hunter reassures himself and his family that he is a worthwhile human being, a provider, a productive member of society. In a day and age when Native American traditions are hanging onto continued existence by a thread, when many Native Americans are subject to rates of alcoholism, depression, and suicide several times above the national averages, continued access to traditional game allows Alaska Natives to remember who they are and to find self-respect in roles that make sense within their own cultural traditions rather than constantly measuring success in terms dictated by mainstream American culture.25

The final characteristic of the remote village is the complex of interlocking governing institutions that such a tiny community supports. Three such institutions exist on a village level: the tribal government, municipal government, and Alaska Native Claims Settlement Act ("ANCSA")26 village corporation.27 Each operates with a different legal base, providing varying purposes, powers, constraints, and capabilities. Although the laws governing these entities were the product of forces outside the village, villagers have attempted to adapt the resulting institutions to their own local needs, thereby harnessing the powers of these institutions to shape the village's destiny.

Typically, remote villages have two governments: a tribal government and a municipal government chartered under state law. Most villages are incorporated as second-class cities,28 mainly to gain access to recently available state revenue sharing.29 Long before these municipalities appeared, however, the villages had tribal governments, recognized by both the federal government and village residents.30

Also part of this institutional complex is the ANCSA village corporation. As with all profit-seeking corporations organized under state law,31 the ANCSA corporation is run by a board of directors

25. SOUTHWEST HABITAT GUIDE, supra note 6, at 603.
27. Id. § 1607.
28. C&RA MAP, supra note 3.
29. See, e.g., ALASKA STAT. §§ 29.60.350-.370 (1986 and Supp. 1987) (defines method of disbursement of revenue from the municipal assistance funds). Tribal governments are entitled to much more limited federal funds from the Bureau of Indian Affairs.
31. 43 U.S.C. § 1606(d) (1982) (regional corporation); id. § 1607(a) (village corporation).
elected by majority shareholder vote. Unlike most corporations, however, the shares of ANCSA village corporations are widely distributed, being held by every Native resident alive in 1971. Due to this broad distribution of ownership, ANCSA corporations often provide “public” services to village residents. In undertaking such programs, the corporation is subject to two constraints: the threat that a shareholder derivative suit could challenge such programs as a waste of corporate assets; and the ultimate necessity of generating profits to underwrite continued corporate existence. Even when engaging in purely “business” operations, the ANCSA village corporation may undertake operations which benefit the village or provide opportunities for villagers’ employment, rather than engaging in operations undertaken purely for profit potential.

Regional entities also reach into the village to provide public services. Perhaps the most important of such regional institutions are the “regional nonprofits”. Their boards of directors generally are made up of representatives from each tribal council in the region. These organizations get many state and federal grants to provide social services such as village health clinics, alcohol treatment programs, and women’s shelters. In some regions, local residents have sought to administer as many state and federal programs through the regional nonprofit as possible, so that services will be provided by an organization managed by Natives.

32. Id § 1604. Until 1991, a living shareholder cannot transfer ownership of these shares, except pursuant to a court decree of separation, divorce, or child support, or by a stockholder who is a member of a professional organization, association, or board that limits the ability of that stockholder to practice his profession because of holding stock. Id. §§ 1606(h)(1), 1607(c). Thus, almost every Native resident of the village can vote for village corporation board of directors. Of course, real control, as in any corporation, may rest with management.

33. T. BERGER, supra note 7, at 37.

34. ANCSA corporations began life endowed with cash and had to decide in what business to invest. Id. at 28. Many chose to set up or buy businesses in the village, though the opportunities for profit are often marginal there. Id. at 34. See also Chapter 11 Protection Sought by Tigara Corp., Tundra Times, Nov. 24, 1986, at 6, col. 1 (chronicling the bankruptcy of such a village corporation).

35. Some are single purpose, such as the regional school districts and regional housing authorities, while others provide a range of services. Most villages, however, do not lie within the boundaries of a regional borough. C&RA MAP, supra note 3. The ANCSA regional corporations, whose shareholders consist of Alaska Natives residing in the region in 1971, 43 U.S.C. §§ 1604, 1606(g) (1982), have devoted their resources to “public” services to varying degrees from region to region. T. BERGER, supra note 7, at 37.


Alaska’s remote village is a community with unique characteristics. Its mixed subsistence-based economy differs substantially from that of mainstream American society. Village residents want to protect and maintain this economy, because it provides them not only with “nigipaq,” but also with traditional identities for self and family. Villagers try to use a complex of governing institutions to maintain local control and to avoid being overwhelmed by the needs, desires, and even the whims and fancies of an alien mainstream society.

B. Myths and Realities of State Game Management in Remote Villages

1. Federal and State Game Management Systems. Game management traditionally has been the province of state governments, rooted in the legal fiction that the sovereign owns the wild fish and game within its borders. In Alaska, more so than in most states, however, many game resources are subject, at least in part, to management by entities other than the Alaska Department of Fish and Game (“ADF&G”). Certain species, including whales, seals, walrus, sea otter, polar bears, and migratory birds, are federally managed due to treaty commitments of the United States. Further, federal land management agencies in charge of units established in the Alaska National Interest Lands Conservation Act (“ANILCA”) have the responsibility to assure that hunting regulations applicable to those units are compatible with the purposes for which those lands were set aside. The National Park Service and Fish and Wildlife Service have, however, decreed in their regulations that state game law applies on the Alaska National Parks, Preserves, Monuments, and Wildlife Refuges managed by these two agencies.

39. See infra notes 166-70 and accompanying text.
In addition, federal law places restrictions on the way that the State of Alaska can manage game throughout the state. For the purposes of this article, the most important such federal requirements deal with the procedures for writing state hunting regulations. Section 805 of ANILCA requires the state to implement a system of local fish and game advisory committees and regional advisory councils. Under this federal statute the regional advisory councils’ powers surpass merely tendering advice. They are to make annual recommendations for managing wildlife populations, which the Board of Game can only overrule if they “are not supported by substantial evidence presented during the course of its administrative proceedings, violate recognized principles of wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs.” Thus, section 805 seeks to assure that state hunting regulations are sensitive to local subsistence needs by establishing procedures for regulations to be written by councils of local residents, with supervision by the Board of Game only as necessary to assure that the regulations are consistent with the conservation of game.

The legislative history of title VIII of ANILCA underscores the fact that the regional councils would have more than an advisory role.

43. Title VIII of ANILCA, 16 U.S.C. § 3111-3126 (1982 & Supp. III 1985), provides a variety of protections for subsistence. See, e.g., Village of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984), rev'd on other grounds sub nom. Amoco Prod. Co. v. Village of Gambell, — U.S. —, 107 S. Ct. 1396 (1987), including requirements for state management of fish and game. Under title VIII of ANILCA, the state can regulate hunting and fishing on federal lands only if certain requirements are met. 16 U.S.C. § 3115 (1982). If the state is not in compliance with these requirements, ADF&G would be unable to manage fish and game resources on federal lands comprising over half of the lands in Alaska. Among these measures is the infamous “subsistence priority” which has stirred so much protest among some sport hunters. Id. § 3114 (“The taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.”).

44. 16 U.S.C. § 3115 (1982) (requires the Secretary of the Interior to establish regional councils but provides that if the state enacts laws of general applicability consistent with the other provisions of title VIII, such state law shall supersede federal law).

45. Id. § 3115(a)(3)(D). Regional council annual reports are to contain an identification of current and anticipated regional subsistence uses, an evaluation of subsistence needs, a strategy for management of wildlife populations to accommodate subsistence uses and needs, and recommended regulations to implement the strategy. Id. The councils must be provided “adequate qualified staff” and copies of “all available technical and scientific support data.” Id. § 3115(b). Local fish and game advisory committees are to assist and provide advice to the regional councils. Id. § 3115(a)(3)(D)(iv).

46. 16 U.S.C. § 3115(d) (1982). If the Board of Game turns down a regional advisory council proposal, the Board “shall set forth the factual basis and the reasons for its decision.” Id.
Title VIII was enacted to change the status quo, which Congress found gave rural residents too little input into subsistence management.\textsuperscript{47} In title VIII, Congress included a finding that to protect subsistence "an administrative structure [must] be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of... subsistence uses on the public lands in Alaska."\textsuperscript{48} Congress made a deliberate choice to give regional councils more than an advisory role. The House rejected two earlier versions of the bill in which the councils' powers were merely advisory.\textsuperscript{49}

The State of Alaska has not implemented these federal procedural requirements entirely faithfully. Divergence from ANILCA's mandate begins subtly in state law.\textsuperscript{50} State regulations\textsuperscript{51} authorizing regional councils do mention that the councils can produce an annual report containing a recommended strategy for the management of fish

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47. Congressman Udall, one of the principal authors and supporters of ANILCA, explained on the floor of the House why the subsistence subchapter of ANILCA was necessary:

In 1971, the Congress, in the conference report on the Alaska Native Claims Settlement Act, instructed both the Secretary of the Interior and the State of Alaska: "to take any action necessary to protect the subsistence needs of the (Alaska) Natives."

The responsibility was accepted by the Secretary and the State in exchange for the exclusion from that act of a subsistence management title developed by the Senate.

Both the State and the Secretary have been reluctant... to provide rural people with a meaningful opportunity to participate in the management and regulation of subsistence resources in their local area.

[We promised [Alaska's rural Native people] that we would work to try to achieve legislation which would include a subsistence management process to insure meaningful participation by rural people in decisions of both the State and Federal governments which so effect [sic] their culture and their lives... . . .


49. Congressman Grudger criticized the Breaux-Dingell bill, one of the two bills rejected by the House, because:

regional boards established pursuant to the Breaux-Dingell bill will be totally advisory in nature, a major compromise in the commitment of this body last year to provide rural people with a meaningful opportunity to participate in the decisionmaking process which is critical to the survival of their culture and subsistence way of life.

125 CONG. REC. 11,428 (1979).


and wildlife populations.\textsuperscript{52} No provision of state law, however, recognizes the power of a regional council to write regulations in annual reports, subject only to limited review by the Board of Game. Rather, the regulations contemplate a much more limited, and entirely advisory, role for the regional councils, authorizing each council “in its discretion” to present regulatory recommendations to the Board of Game.\textsuperscript{53} Thus, the state regulations vary significantly from section 805 in the role they grant to regional councils.

2. Operation of Councils and the Board of Game. Divergence from the requirements of section 805 has been especially striking in the operation of regional councils. ADF&G has told regional council members that their actual powers, like the powers of local committees, consist only of giving advice to the Board of Game.\textsuperscript{54} The annual reports required by section 805 have not been produced by the regional councils.\textsuperscript{55} The regional councils, made up of representatives from remote villages,\textsuperscript{56} have generally been able to convene for a single day

\textsuperscript{52} Id. § 96.250(a)(5)(C) (Sept. 1985). ANILCA designed regional councils to be institutions concerned with subsistence needs only. Under federal law their annual reports are to focus upon such needs and designing regulations to meet those needs. See supra note 45. The state regulations, by contrast, require the regional councils to consider and recommend strategies to accommodate subsistence uses “and other fish and wildlife uses.” ALASKA ADMIN. CODE tit. 5, § 96.250(a)(5) (Sept. 1985). The manual distributed to advisory committee members also directs the committees to fill their membership with representatives of “at least three user groups (i.e., commercial fishermen, trappers, sport fishermen, subsistence users, processors, photographers, etc.).” ADF&G, ADVISORY COMMITTEE MANUAL 10 (1983). In ANILCA, the regional council system was to be a bulwark to give subsistence needs primary consideration in the regulatory process. The state regulations convert the regional council system into another forum to mediate allocation of game between subsistence and other users.

\textsuperscript{53} ALASKA ADMIN. CODE tit. 5, § 96.250(c) (Sept. 1985).

\textsuperscript{54} ADVISORY COMMITTEE MANUAL, supra note 52, at 8, 12. The Manual emphasizes that committees and councils are avenues for providing information to the Board about public concerns, so that the Board can write regulations. “Board members want to hear what happened at the committee meeting during discussion of a particular issue, and what the public opinions expressed were. This is the kind of information that is most helpful to board members in helping them make their decisions.” Id. at 11.

\textsuperscript{55} See, e.g., Minutes of South Central Regional Fish & Game Council at 10 (Jan. 31, 1987). The advisory committee manual directs each council to produce such a report, saying that Department staff can provide data and technical support “but the report itself must be written by the council.” ADVISORY COMMITTEE MANUAL, supra note 52, at 13.

\textsuperscript{56} The Arctic Regional Council, for instance, is made up of representatives from all across northern and western Alaska, from the Beaufort Sea coast to the Seward Peninsula. ALASKA ADMIN. CODE tit. 5, § 96.021(c)(5) (Aug. 1986).
meeting once a year.\textsuperscript{57} Lack of travel funds and support staff to coordinate meetings preclude more extensive or frequent meetings.\textsuperscript{58} Such limited meetings are not adequate to permit the councils to write or revise game regulations for each region, to evaluate subsistence needs, or to devise a strategy for meeting subsistence needs in an annual report.\textsuperscript{59} The timing of the meetings also indicates that the state does not intend the regional councils to draft proposed regulations for review by the Board of Game. Meetings are scheduled to occur after printing the booklet that contains proposed game regulation changes to be considered at the Board of Game meeting.\textsuperscript{60} The purpose of these meetings is to permit the regional councils to comment on regulatory proposals produced by other parties, not independently to draft game regulations.\textsuperscript{61} Any proposals created by the regional councils at these meetings could not be circulated for public comment in compliance with the State Administrative Procedures Act.\textsuperscript{62} Thus, barring an emergency justifying enacting such proposals, the Board of Game would not consider such regional council proposals.\textsuperscript{63}

This failure of the State of Alaska to permit the regional councils to fulfill their role under section 805 would not matter if the local

\begin{itemize}
  \item \textsuperscript{57} See, e.g., Minutes of Interior Regional Fish & Game Council (Mar. 31, 1987); Minutes of Arctic Regional Fish & Game Council (Feb. 6, 1987); Minutes of Southcentral Regional Fish & Game Council (Jan. 31, 1987); Minutes of Southwest Regional Fish & Game Council (Nov. 22, 1986). But see Minutes of Southeast Regional Fish & Game Council (Jan. 15, 1987), (Mar. 13, 1987) & (Apr. 15, 1987). The Arctic Regional Council did not meet at all in 1986. Minutes of Arctic Regional Fish & Game Council at 9 (Feb. 6, 1987).
  \item \textsuperscript{58} Telephone interview with Beth Stewart, Division of Boards, ADF&G (1986).
  \item \textsuperscript{60} Telephone interview with Bob Larson, Division of Boards, ADF&G (Sept. 11, 1987).
  \item \textsuperscript{61} For instance, for the spring Board of Game meeting in 1987, none of the 247 proposals on the Board's agenda was introduced by a regional council. Before that Board of Game meeting, two regional councils each took action supporting a proposal from an advisory committee and a village tribal council respectively. Unapproved Minutes of Interior Regional Fish & Game Council at 2 (Mar. 31, 1987) (petition by Ruby Advisory Committee to stop decline of moose); Minutes of Arctic Regional Fish & Game Council at 9 (Feb. 6, 1987) (Noatak Traditional Council proposal to form Noatak Controlled Use Area). Neither proposal made it onto the Board's agenda. Telephone interview with Bob Larson, Division of Boards (Sept. 11, 1987). One was denied because it raised issues regarding aerial wolf control that were previously decided by the Board, it was not supported by new evidence, and it required changes to predation control regulations. \textit{Id.}; see also Letter from Bob Larson, Division of Boards to Royce Purinton, Chairman, Interior Regulatory Council (June 12, 1987). The other was deferred for consideration to the spring of 1988. Telephone interview with Bob Larson, Division of Boards (Sept. 11, 1987); Letter from Bob Larson, Division of Boards to Weaver Ivanoff, Arctic Regional Council (Sept. 8, 1987).
  \item \textsuperscript{62} Telephone interview with Bob Larson, Division of Boards (Sept. 11, 1987).
  \item \textsuperscript{63} \textit{Id.}
\end{itemize}
advisory committees were actively creating regulatory proposals regularly accepted by the Board of Game. The advisory committees, however, are having mixed results participating in the process of creating regulations. Some local committees, especially those with members from several remote villages, have met sporadically. The Board of Game has not routinely approved of regulatory proposals coming from advisory committees.

Game regulations, rather than being produced by the regional councils, are passed into law by the Board of Game. The group that appears to have the most influence with the Board of Game, based on the frequency with which its proposals are accepted, is the staff of the Game Division. This influence of the Game Division has not produced regulations overly sensitive to subsistence hunters' needs. The Game Division formerly was a strong advocate in favor of sport hunting interests and against subsistence. In the last few years, however, the Division has developed a policy of avoiding taking stands on how game will be allocated among users, sticking solely to the biological issues of ensuring healthy game populations. This studied neutrality does not, however, ensure that Game Division proposals will necessarily lead to game regulations suited to village needs. Game Division biologists do not generally have any training in anthropology or other social sciences, nor any knowledge of the very different hunting values

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64. For instance, in the NANA region of northwest Alaska, the Kotzebue Fish and Game Advisory Committee, made up almost entirely of members of Kotzebue, has met approximately once a month in 1986, while the region's other advisory committees, which all have membership shared between at least two villages, have met perhaps once a year. Interview with Victor Karmun, Arctic Region Fish and Game Advisory Committee Coordinator, ADF&G (1986).

65. At the 1987 spring Board of Game meeting, for instance, approximately 25% of proposals from advisory committees were enacted by the Board of Game. Compare Packet of Regulatory Proposals for March/April 1987 Board of Game Meeting with Alaska Game Regulations No. 28 (effective July 19, 1987-June 30, 1988). Committee proposals did fare better than proposals from individuals or special interest groups, of which only about five percent were adopted. Compare Packet of Regulatory Proposals for Mar./Apr. 1987 Board of Game Meeting with Alaska Game Regulations No. 28 (effective July 19, 1987-June 30, 1988).

66. Well over half of the proposals from Fish & Game staff at the 1987 spring Board of Game meeting were implemented with little or no modification. Id.


68. Telephone interview with Steve Behnke, Subsistence Division, ADF&G (Sept. 11, 1987). In addition, Game Division will not make a proposal to the Board of Game when a proposal on the same topic is coming to the Board from an individual, group, or advisory committee. See Packet of Regulatory Proposals for March/April 1987 Board of Game Meeting, supra note 65, passim.
of Alaska Native cultural traditions.69 Thus, these biologists are ill-prepared to understand the needs and values of subsistence hunters.

Nor are Board of Game meetings structured to facilitate input from subsistence hunters.70 Meetings are held in urban centers such as Anchorage or Juneau and often go on for weeks,71 the Board considering hundreds of proposals to change regulations in different areas of the state.72 The agenda is not organized in such a way that the public can know ahead of time when the Board will consider a specific proposal.73 Even advisory committee chairmen, whom the state can pay a per diem to attend Board of Game meetings, have difficulty spending weeks waiting for the Board to discuss regulatory changes in their region.74 In recent years, however, advisory committee representatives have been attending Board of Game meetings with increasing frequency and have been achieving some influence with the Board of Game.75

Basically, it is very difficult for the Board of Game to create regulations suited to subsistence hunters' needs. A board setting rules statewide inherently will be less sensitive to local values, local needs,

69. The Subsistence Division has begun to deal with this deficiency with a cross-cultural training program for other ADF&G staff. Telephone interview with Robert Schroeder, Subsistence Division, ADF&G (1986).

70. Subsistence Division personnel do attend the meetings and provide anthropological information on subsistence uses and needs. For many proposals, Subsistence Division may not be able to provide the Board with information to assess the impact of the regulatory change on villagers. Subsistence Division research projects, however, are seldom so narrowly focused as to provide information that would assist the Board in selecting one regulatory proposal over another, regarding proper methods and means of hunting, seasons, or bag limits. Due to the dearth of basic research about subsistence, Subsistence Division has had its hands full developing basic information such as that presented in the description of remote villages. See supra notes 4-26 (sociological data). Just as Game Division avoids taking positions on allocation questions, Subsistence Division does not advocate for subsistence interests. Rather, Subsistence Division presents the Board with whatever anthropological information on subsistence uses that the Division can provide. Telephone interview with Steve Behnke, Subsistence Division, ADF&G (Sept. 11, 1987).

71. The spring meeting of the Board of Game in 1987 lasted from March 30 to April 15. Telephone interview with Bob Larson, Division of Boards (Sept. 11, 1987).

72. At the March/April 1987 Board of Game meeting, held at the Anchorage Westward Hilton Hotel, the Board considered 193 separate proposals to alter game regulations. Packet of Regulatory Proposals for March/April 1987 Board of Game Meeting, supra note 65.

73. The Division of Boards has a phone number with a recorded message during the Board meeting with current updates on the Board's agenda. Id., Cover Letter to Reviewers.

74. Interview with Calvin Moto, former Chairman, Arctic Regional Fish and Game Council (1986).

75. Telephone interview with Steve Behnke, Subsistence Division, ADF&G (Sept. 11, 1987).
and local conditions, than a regional or local decision-making body.\textsuperscript{76} In those rare circumstances when an advisory committee, Subsistence Division, and Game Division can reach consensus on a proposal, the Board of Game is extremely likely to accept their recommendations, unless some other group objects.\textsuperscript{77} For all the reasons discussed above, however, when the Board of Game considers proposals to change game regulations, the Board thus often does not have adequate information about subsistence hunting practices, needs, and values. It is no surprise, therefore, that the Board fails to write regulations responsive to village needs.\textsuperscript{78} Nor is it astonishing that village hunters react to these hunting regulations with widespread noncompliance.\textsuperscript{79}

3. Enforcement of Game Regulations. In part, village hunters' noncompliance with state game regulations is the state's fault, since the state fails to communicate its legal requirements to villagers in understandable form. Game regulations are distributed to hunters in a booklet which includes seasons, bag limits, permitting and tagging requirements for all hunts in the state, as well as special use restrictions and general applicable regulations setting out allowable methods and means of hunting.\textsuperscript{80} In recent years this booklet has run about one hundred pages in length.\textsuperscript{81} This booklet is overly long and complex — even a lawyer has difficulty finding in it all regulations applicable to a particular hunt.\textsuperscript{82} The language of many regulations is

\textsuperscript{76} State regulations on such issues as legal methods and means of hunting mostly apply statewide, with some local exceptions. Thus, it is difficult for the Board of Game to tailor methods and means regulations to track the traditional methods and means of hunting in various Native traditions around the state.

\textsuperscript{77} Telephone interview with Steve Behnke, Subsistence Division, ADF&G (Sept. 11, 1987).

\textsuperscript{78} T. BERGER, supra note 7, at 59-60.

\textsuperscript{79} Id. at 65 ("When a law stands between the Natives and their resources, when it does not take basic economic realities into account, when it conflicts with Native principles or beliefs, compliance with the law is low.").

\textsuperscript{80} See, e.g., Alaska State Game Regulations No. 28 (effective July 1, 1987 to June 30, 1988) [hereinafter Regulations No. 28].

\textsuperscript{81} See, e.g., Alaska State Game Regulations No. 26 (effective July 2, 1985-June 30, 1986) (107 pages). For 1987-88 ADF&G increased the page size, reduced the typeface, and managed to produce a booklet of 48 pages. Regulations No. 28, supra note 80.

\textsuperscript{82} For instance, this complexity can be illustrated through a description of all game regulations applicable to a subsistence caribou hunt by a local resident in Game Management Unit 23 in Northwest Alaska. Seasons, bag limits, sex restrictions, and transport restrictions south of the Yukon River are listed in one section of the Game Regulation booklet. Regulations No. 28, supra note 80, at 28. In another section the hunter can ascertain that there are no special use restrictions in Game Management Unit 23. Id. at 27. The fees and requirements for a hunting license are listed at the beginning of the booklet along with the exceptions for Alaska residents over 60 and under 16 and disabled veterans. Id. at 2-3. The hunter is required to be "registered to
ambiguous, yet hunters are held strictly liable for game violations.⁸³

hunt caribou in Northwest Alaska or [have] an Arctic caribou harvest report."

ALASKA ADMIN. CODE tit. 5, § 92.010 (July 1985), reprinted in Regulations No. 28, supra note 80, at 4. Weaponry which can be used to take big game are listed in a regulation titled “Lawful Methods and Means of Taking Game.” ALASKA ADMIN. CODE tit. 5, § 92.075 (June 1986), reprinted in Regulations No. 28, supra note 80, at 6. The hunter can only determine that caribou are included in the term “big game” by referring to another regulation, which is listed on a different page of the booklet. ALASKA ADMIN. CODE tit. 5, § 92.990 (July 1986) (definitions), reprinted in Regulations No. 28, supra note 80, at 9. Only in Game Management Unit 23 can “a motor driven boat be used to take caribou,” ALASKA ADMIN. CODE tit. 5, § 92.080(4) (June 1986), reprinted in Regulations No. 28, supra note 80, at 6, and caribou can be taken while swimming. ALASKA ADMIN. CODE tit. 5, § 92.085(3) (July 1985), reprinted in Regulations No. 28, supra note 80, at 6. Caribou, however, cannot be taken “from any mechanical vehicle,” id., or “with the use of an aircraft, snowmachine, motor-driven boat, or other motorized vehicle for the purpose of driving, herding, or molesting game.” ALASKA ADMIN. CODE tit. 5, § 92.080(5) (June 1986), reprinted in Regulations No. 28, supra note 80, at 6. The complex and confusing language used to bar hunting the same day a hunter is airborne should not concern a subsistence hunter unlikely to have access to air transportation. See ALASKA ADMIN. CODE tit. 5, § 92.085(4) (July 1985), reprinted in Regulations No. 28, supra note 80, at 6. The regulation governing purchase and sale of game reads:

(a) Except as provided in (b) of this section, the purchase, sale, or barter of game or parts of game is permitted.

(b) Except as provided in [ALASKA STAT. § ] 16.05.930(e) [relating to the barter of subsistence taken game], no person may purchase, sell, or barter the following:

(1) the meat of big game . . . however, caribou may be bartered in units 22-26 but such bartered caribou may not be transported or exported from those units . . . .

ALASKA ADMIN. CODE tit. 5, § 92.200 (Oct. 1985), reprinted in Regulations No. 28, supra note 80, at 7-8. Tucked into a regulation titled “Salvage of Game Meat, Furs, and Hides” is a requirement that caribou meat in this unit “must be removed immediately from the field.” ALASKA ADMIN. CODE tit. 5, § 92.220(c) (July 1985), reprinted in Regulations No. 28, supra note 80, at 8. The term “meat” is not defined, although “edible meat” is. ALASKA ADMIN. CODE tit. 5, § 92.990(14) (July 1986), reprinted in Regulations No. 28, supra note 80, at 9. Salvage requirements for meat are contained in state statutes, which are briefly described but not reprinted in the game booklet. Id. at 10. Some of these salvage requirements apply to caribou. Id.

See generally P. SCHAEFFER, D. BARR, & G. MOORE, KOTZEBUE FISH AND GAME ADVISORY COMMITTEE REGULATION REVIEW: A REVIEW OF THE GAME REGULATIONS AFFECTING NORTHWEST ALASKA (1986) [hereinafter REGULATION REVIEW]. One instance is the regulation makes it illegal to use a snowmachine for the purpose of “driving, herding, or molesting game.” Id. at 16 (criticizing ALASKA ADMIN. CODE tit. 5, § 92.080(5) (June 1986)). If a hunter driving a snowmachine across the tundra encounters a group of caribou and they, startled by the machine, begin running, under what circumstances can the hunter attempt to take a caribou from the group? Can the hunter continue driving if the caribou start running in the same direction as the snowmachine or must he stop his machine?

⁸³ See generally P. SCHAEFFER, D. BARR, & G. MOORE, KOTZEBUE FISH AND GAME ADVISORY COMMITTEE REGULATION REVIEW: A REVIEW OF THE GAME REGULATIONS AFFECTING NORTHWEST ALASKA (1986) [hereinafter REGULATION REVIEW]. One instance is the regulation makes it illegal to use a snowmachine for the purpose of “driving, herding, or molesting game.” Id. at 16 (criticizing ALASKA ADMIN. CODE tit. 5, § 92.080(5) (June 1986)). If a hunter driving a snowmachine across the tundra encounters a group of caribou and they, startled by the machine, begin running, under what circumstances can the hunter attempt to take a caribou from the group? Can the hunter continue driving if the caribou start running in the same direction as the snowmachine or must he stop his machine?

⁸⁴ ALASKA ADMIN. CODE tit. 5, § 92.002 (July 1985) (“Unless otherwise provided in [ALASKA ADMIN. CODE tit. 5, §§ ] 78-92, or in [ALASKA STAT. § ] 16, [a person who violates a provision of ALASKA ADMIN. CODE tit. 5, §§ 78-92] is strictly liable for the offense, regardless of the person’s intent.”). This regulation overturns
Many subsistence hunters have limited formal schooling and cannot understand the regulations as presented in this booklet. Another problem is that village fee agents selling hunting licenses often do not get enough booklets to distribute to hunters.

Many subsistence hunters, even if they know the requirements of state law, do not follow regulations that to them make no sense. Instead, they comply with the conventional law of their cultural tradition. Residents of remote villages hold shared values and expectations, rooted in their Native cultural tradition, about what is "good hunting" and what is "bad hunting." Hunters who do not live up to the community's expectations suffer the disapprobation of the residents.

State v. Rice, 626 P.2d 104 (Alaska 1981), which held that "fish and game regulations are not necessarily by their very nature immune from the requirement of mens rea." Id. at 108.

85. The author is acquainted with one subsistence hunter who always carries a copy of the game regulation booklet in his parka pocket when hunting, though he is illiterate.

86. REGULATION REVIEW, supra note 83, at 4.

87. See, e.g., REGULATION REVIEW, supra note 83, at 15 (regulations ban rimfire but allow semi-automatic centerfire weapons); id. at 23-24 (regulations ban traditional Inupiaq practice of caching meat to cure in the field but have no provisions to deal with sport hunters who choose to camp next to the kill and fail to take measures to preserve meat and thereby allow spoilage). Probably the most pervasive way in which state game regulations fail to adapt to subsistence hunters' needs is in the regulations' use of individual bag limits. A variety of factors make individual bag limits inappropriate for subsistence management. As has been mentioned previously, a few hunters in each village are extremely productive and share their take, thereby supporting other households. See supra note 23. In addition, the fluctuations of the seasonal round result in the village depending heavily on one resource, such as caribou, in one year while enjoying plenty of another resource, such as seals, in another year. See supra note 14. It is the overall village take of game that remains steady. See supra note 14. Given these patterns, only limits on take at the village level would meet subsistence hunters' needs. Yet the state refuses to enact village bag limits. See Second Amended and Supplemental Complaint at 8-9, Bobby v. Alaska (D. Alaska Oct. 15, 1985) (No. A84-544).

88. T. BERGER, supra note 7, at 65-66. Greg Moore describes a paradigmatic caribou hunt in Northwest Alaska which, although sound with respect to conservation of game resources, involves literally dozens of violations of state game regulations: hunters failing to bring along their wallets containing their hunting licenses (to avoid losing their wallets), shooting caribou while resting the gun on the seat of a snowmachine (the firmest and most reliable base for a shot in the entire snow-covered landscape), giving caribou to elders in the village, and one elder choosing voluntarily to reciprocate by underwriting a hunter's gasoline costs. G. MOORE, A REVIEW OF GAME MANAGEMENT IN NORTHWEST ALASKA 10-11 (1984).

89. T. BERGER, supra note 7, at 59; R. NELSON, supra note 5, at 14-32 (1983); J. MAGDANZ & A. OLANNA, CONTROLS ON FISHING BEHAVIOR ON THE NOME RIVER 60-81 (ADF&G Subsistence Division Technical Paper No. 102, 1984). As one anthropologist has put it, in spite of the insecurity inherent in annual fluctuations and village lack of control over the supply of game, "[i]t does not follow . . . that Native hunters kill everything they can get their hands on." E. BURCH, supra note 13, at 116.
their fellows. In communities as tightly knit as these villages, where each household relies on sharing with others to get through lean times, such peer pressure can be powerful stuff. Since these values are shared norms within a definable society, and since the society imposes penalties for transgressions of the norms, the normative system constitutes a system of law. It has not been generally recognized as such, due to its unwritten nature and non-institutionalized methods of implementation. Nonetheless, it fulfills the function of a legal system within the village, and is far more effective for insuring hunting behavior acceptable to that community than most urban outsiders can imagine.

Since there are few or no state or federal enforcement personnel in many remote areas of Alaska, subsistence hunters can continue to hunt under their traditional law rather than under state regulations. Occasionally, a village hunter is prosecuted. If his game violation does not violate the village's traditional law, however, his peers in the village feel that he is being unjustly persecuted, and they may fail to cooperate with state enforcement personnel.

Game violations by subsistence hunters are of two types: (1) substantive, where hunters engage in hunting practices allowed or even preferred under traditional law but illegal under state law; and (2) procedural, where hunters fail to comply with state paperwork requirements for licenses, permits, tags, and so on. The second type of violation is more pervasive than the first, because reporting requirements are especially incomprehensible to subsistence hunters operating in an unwritten, non-mathematical cultural tradition. Subsistence hunters track the health of game populations by observing animals on the land. They find strange the very different methods used by game biologists. In many rural areas, state game biologists know better than...
to rely on reported information from hunters in managing game populations, because such information grossly undercounts the subsistence take. To collect accurate information in subsistence take, ADF&G must use other methods, all requiring the cooperation of subsistence hunters for accuracy.97

The result is a situation of only nominal state game "management." In fact, traditional law and controls on hunters internal to the villages are important factors in game management in remote areas, and village cooperation in providing information is crucial for the state even to monitor what is going on. Since the traditional law system, however, does not rely on institutional mechanisms recognizable to state policy-makers, the operation of this system is not generally acknowledged.

Village hunters do not like to hunt in violation of state game regulations, in spite of low risk of prosecution. It makes them nervous.98 They want either to change state game regulations to conform more closely with their own traditions,99 or to get out of the state regulatory system altogether. In order to escape state regulation, some villages are exploring the possibility of writing their own game codes in tribal law, thereby preempting the operation of state law. The remainder of this article will discuss the legal feasibility of such efforts.

III. FEDERAL INDIAN LAW PRINCIPLES DEFINING THE ROLE OF TRIBAL GOVERNMENTS

The doctrines contained in the field of federal Indian law define the place and the powers of tribal governments within our federal system. Although some, particularly the State of Alaska, question the applicability of these doctrines to Alaska Natives,100 the courts in the

97. Regulation Review, supra note 83, at 14. Under the standards of Native traditional belief systems, biologists' methods of monitoring game populations may even be harmful to animals. See, e.g., J. Magdanz & A. Olanna, supra note 89, at 57; R. Nelson, supra note 5, at 210.

98. If they know that enforcement personnel might be in the area, some hunters will stop all hunting rather than risk inadvertently violating some regulation of which they are ignorant. For instance, in early 1986, after the National Park Service charged Clement Downey with hunting sheep without a registration permit in Noatak National Preserve, some hunters in Kiana stopped hunting in Kobuk Valley National Park out of fear that they too would be prosecuted by Park Service. Interview with residents of Kiana (1986). By contrast, hunters in the neighboring village of Noatak continued to hunt sheep in Noatak National Preserve without registration permits, in spite of Park Service enforcement efforts. Interview with residents of Noatak (1986).


modern era have analyzed the position of Alaska Natives and of their
tribal governments using the same principles applied to Indians and
tribes in the lower forty-eight states.\textsuperscript{101} Therefore, this section dis-
cusses the relevant federal Indian law doctrines and their application
to the question of whether tribes can exercise jurisdiction over hunting
on certain lands in Alaska. Specifically, this section begins with a brief
introduction to federal Indian law, discussing, as it must, three bed-
rock John Marshall decisions, which the Chief Justice handed down in
the earliest decade of our republic. These decisions set forth the prin-
ciples of the rule of discovery, doctrine of aboriginal title, and federal
trust responsibility, all of which have historical importance and, more
importantly for the purposes of this article, are doctrines that the
United States Supreme Court continues to draw on in deciding juris-
dictional disputes between states and Native Americans. After setting
forth these general principles, section IV focuses on two inquiries:
first, whether ANCSA village corporation lands are Indian country;
second, whether the tribes can invoke the doctrine of preemption to
support their ability to exert exclusive tribal jurisdiction over these
ANCSA lands.

A. The Rule of Discovery and the Doctrine of Aboriginal Title

The first Indian law decision handed down by Chief Justice John
Marshall concerned Indian property rights. In this case, \textit{Johnson v. M'Intosh},\textsuperscript{102} the Chief Justice laid out the unique property rights ap-
plicable to lands occupied by Indians from time immemorial. Thus,
the case makes it clear that Indians hold a unique status and that these
aboriginal people would not be governed by the same rules as settlers
from the Old World and their descendents. This 1828 decision lays
out two related concepts — the \textit{rule of discovery} and the \textit{doctrine of
aboriginal title} — which define the respective land rights of Native
American occupants and settlers from the Old World.\textsuperscript{103} The case
arose when an Indian tribe sold some of its traditional lands to a set-
tler and then later ceded the same lands to the federal government by

\textsuperscript{101} People of Togiak v. United States, 470 F. Supp. 423 (D.D.C. 1979) (Alaska
Natives are entitled to protections of federal trust responsibility); Eric v. United States
are entitled to protections of federal trust responsibility); Native Village of Tyonek v.
in Alaska villages entitled to same sovereign immunity as Indian tribes in the lower
forty-eight states).

\textsuperscript{102} 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{103} \textit{Id.} at 588-92.
treaty. After the federal government sold its interest, this quiet title action sought to resolve competing claims to the lands. One claimant's title traced back to the tribe's direct sale to the settler. The other party held title originating in federal patent after Indian treaty cession to the United States.

_M'Intosh_ held that the Indians had an interest in lands they traditionally occupied, but that their interest was less than fee simple. In analyzing the case, Marshall used a doctrine of international law, the rule of discovery. This principle, recognized among European nations, gives title of New World lands to the European sovereign first exploring the area. Title obtained under the rule of discovery does not mean that Native American inhabitants have no right to the land. The Indians have a right of occupancy that can be extinguished only by,

104. *Id.* at 594.
105. *Id.* at 555-57, 571-72.
106. *Id.* at 560.
107. *Id.* at 591-92.
108. This doctrine has its intellectual roots in the ideas of Francisco de Vitoria, a Spanish theologian of the sixteenth century, who recognized that Indians, although heathens, had property rights. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 50-52 (1982 ed.); V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2-4 (1983). In _M'Intosh_, Marshall's decision cites extensive legal history to show recognition of this rule of discovery, especially by England and its successor in interest, the United States. 21 U.S. at 572-87. Marshall explains that the rule was "necessary in order to avoid conflicting settlements, and consequent war" between European countries. *Id.* at 573. Finally, in a curious argument, Marshall asserts that since the United States has "unequivocally" followed this rule, *id.* at 587, has defended its rights under the rule "by the sword," *id.* at 588, and since it is the basis of all land titles in the nation, *id.* at 588-89, the courts must respect and enforce the rule. *Id.* at 588, 591.
109. *Id.* at 574, 591. Under the rule of discovery, aboriginal people's possessory interest in the lands they occupy is less than fee title. Marshall defends denying Indians title with a policy argument, finding "some excuse, if not justification, in the character and habits of the people." *Id.* at 589. As he explains, the relationship between Indians and settlers differs from that of a conquered European people and a victorious neighbor state. Normally, a conquered people's rights could be respected because they could either become citizens of the conquering nation or could be safely governed as a distinct people. *Id.* at 589-90. The Indians, however, proved themselves incapable of either of these solutions:

> The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

*Id.* at 590.

Even at this early date, Marshall was confronting the unresolvable problem of coexistence between aboriginal people in a subsistence culture and settlers inculcated with Western values and operating in a capitalist economy. Allowing these aboriginal people to continue their subsistence use of land interfered with settlers' designs to
or with the consent of, the sovereign holding title to the area under the rule of discovery.110

Subsequent cases have fleshed out the nature of aboriginal title rights. Aboriginal title is a collective, not an individual, right, with title held by the tribe, rather than by its individual members.111 Furthermore, aboriginal title can only be extinguished by treaty or by statute.112 When Congress does extinguish aboriginal title by statute, no compensation is owed under the fifth amendment.113 Conversely, when rights are given to Indians in treaty or statute in exchange for extinguished aboriginal title, such treaty or statutory rights are entitled to fifth amendment protection.114

The doctrine of aboriginal title has special importance in Alaska. ANCSA, which extinguished any Native claims based on aboriginal title and granted lands to Native corporations in settlement of such
claims, can only be understood in reference to this doctrine explicated in M'Intosh.

B. Federal Trust Responsibility

The second and third John Marshall Indian law decisions discuss the relationships between the federal, tribal, and state governments. The rule of discovery and doctrine of aboriginal title deal primarily with the property rights of Native Americans. Even these property doctrines, however, implicitly recognize an Indian right to sovereign government, since these doctrines recognize that aboriginal title is held communally by the tribe and that the tribe deals government to government with the United States to cede such title. John Marshall clarified the relationships of tribal governments to the federal government and to the states in two cases involving the Cherokee in Georgia.115

The first case, Cherokee Nation v. Georgia,116 was filed in the Supreme Court as a case within the Court's original jurisdiction after Georgia passed laws whose enforcement would strip the Cherokee of their land and tribal sovereign powers. The tribe's claim to original jurisdiction in the Supreme Court could only be upheld if the tribe qualified as a "foreign state."117 Marshall wrote the majority opinion denying the Court's jurisdiction over the case, despite finding that the Cherokee Nation was a state. Without discussion, Marshall implicitly recognized that Cherokee sovereignty preexisted European contact. In support of its finding that the tribe was a state, the decision noted that the Indians "have been uniformly treated as a state from the settlement of our country."118 Marshall, however, was compelled to deny jurisdiction over the case, because he found that this Cherokee state was not a foreign state.119 It was, as Marshall explained, a "domestic dependent nation,"120 and its "relation to the United States resemble[d] that of a ward to his guardian."121

The nature of these "domestic dependent nations," their powers, and their trust relationship to the United States was further elucidated when the conflict between the State of Georgia and the Cherokee tribe returned to the Court two years later in Worcester v. Georgia.122 This case arose when a missionary named Worcester refused to obtain a

117. Id. at 20.
118. Id. at 16.
119. Id. at 19 (emphasis added).
120. Id. at 17.
121. Id.
122. 31 U.S. (6 Pet.) 515 (1832).
state permit to enter lands set aside for the Cherokee in federal treaties. When prosecuted and sentenced, he appealed his conviction, asserting that the state law requiring the permit was unconstitutional as repugnant to federal law, namely treaties between the Cherokee and the United States.\textsuperscript{123} Chief Justice Marshall again wrote for the Court, holding the conviction invalid as interfering with the relations between the Cherokee and the federal government and as inconsistent with those treaties.\textsuperscript{124} In his decision, Marshall began with two premises from \textit{M'Intosh} and \textit{Cherokee Nation}: (1) the Cherokee Nation is a government whose powers and authority predate European contact;\textsuperscript{125} and (2) the rule of discovery both recognizes Indian land rights\textsuperscript{126} and allows the Indians to sell their lands only to the United States.\textsuperscript{127} Conversely, under the federal constitution's Indian commerce clause, Congress has exclusive jurisdiction to deal with tribes.\textsuperscript{128} The Cherokee Nation and the federal government had entered into a treaty in which the Cherokee ceded certain lands, accepted the protection of the United States, and guaranteed the remaining Cherokee lands.\textsuperscript{129} Marshall found that under this treaty, "[t]he Cherokee Nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."\textsuperscript{130}

IV. INDIAN COUNTRY AND TRIBAL PREEMPTION OF STATE LAW

Recognition that tribes exist as limited sovereigns within our federal system logically leads to two corollaries: (1) tribes have inherent power to govern their members and their territory; and (2) state governments generally lack authority to apply state law to tribal members and within tribal territory. If tribal and state law conflict, two levels of analysis are necessary to determine which law applies. First, for

\textsuperscript{123} Id. at 538-41.
\textsuperscript{124} Id. at 561.
\textsuperscript{125} Id. at 542-43.
\textsuperscript{126} Id. at 544.
\textsuperscript{127} Id. at 551-52.
\textsuperscript{128} Id. at 558-59.
\textsuperscript{129} Id. at 551-56. In interpreting this treaty, Marshall employed several of the canons of construction applicable to federal laws affecting Indian rights. For instance, Marshall interpreted the treaty as the uneducated Indians would have understood it. \textit{Id.} at 552-53 (interpreting term "allotted"). Marshall also required the treaty to speak clearly in order to limit tribal sovereign rights, stating that ambiguous language did not act to surrender Cherokee self-government: "[h]ad such a result been intended, it would have been openly avowed." \textit{Id.} at 554. The use of such canons of construction in modern case law are discussed \textit{infra} notes 189-205 and accompanying text.
\textsuperscript{130} Id. at 561. This complete preemption of state law in Indian country has been eroded in modern case law. \textit{See infra} notes 206-49 and accompanying text.
tribal law to apply, the land must qualify as "Indian country."\textsuperscript{131} Indian country status does not necessarily mean that state law is preempted. Rather, once a given piece of land is found to be Indian country, tribal preemption analysis is used to determine whether state law can apply.

A. Indian Country

1. \textit{Indian Country Principles.} "Indian country" comprises the lands where tribes can operate as governments. In 1948, Congress defined Indian country as: (1) reservations, (2) allotments, and (3) dependent Indian communities.\textsuperscript{132} Lands included in the first two categories are easy to delineate. "Reservations" are designated as such and set aside for Indians by the federal government in treaty, statute, or executive order.\textsuperscript{133} "Allotments" include all forms of property held in restricted or trust status for Native Americans.\textsuperscript{134}

The lands that qualify as "dependent Indian communities," however, are difficult to identify. This difficulty rests in part on Congress' refusal to expressly define the term. Instead, Congress explained that the "[d]efinition [was] based on . . . construction of the term by the United States Supreme Court in \textit{United States v.} McGowan and \textit{United States v.} Sandoval."\textsuperscript{135} Therefore, to understand the meaning of "dependent Indian communities," these two Supreme Court decisions must be discussed.

The phrase "dependent Indian community" was first used by the Supreme Court in \textit{United States v. Sandoval}\textsuperscript{136} to describe an Indian

\begin{itemize}
\item \textsuperscript{131} Indian tribes have powers to regulate affairs internal to their communities, such as family law or criteria for tribal membership, even without the existence of Indian country. \textit{See generally} F. COHEN, supra note 108, at 467.
\item \textsuperscript{133} \textit{See, e.g., United States v.} John, 437 U.S. 634, 648 (1978) (applying section 1151(a) to the Choctaw Indian reservation in central Mississippi); \textit{see generally} F. COHEN, supra note 108, at 34-38.
\item \textsuperscript{134} \textit{See generally} F. COHEN, supra note 108, at 39-41. Most of these lands are the product of statutes enacted around the turn of this century when federal policy tried to turn Indians into farmers through the magic of private ownership by "allotting" tribally owned lands to individual Indians. To protect Indian owners from being cheated out of their lands by unscrupulous non-Indians, however, these statutes usually required federal approval of any sale or lease of the land, either by having the United States hold title in trust for the Indian owner ("trust" property) or by placing a restriction on title requiring federal approval of any sale or lease ("restricted" property). \textit{See, e.g., Cheyenne-Arapaho Tribes v. Oklahoma,} 618 F.2d 665, 667 (10th Cir. 1980) (modern discussion of Indian allotments); \textit{see generally} F. COHEN, supra note 108, at 130-43.
\item \textsuperscript{136} 231 U.S. 28 (1913).
\end{itemize}
pueblo in New Mexico that did not qualify as a reservation. The Court was reviewing a criminal conviction under federal Indian liquor laws. Those laws barred the importation of liquor into Indian country. The Court held that the defendant could be indicted under that statute, finding that the pueblo was comparable to a reservation because its residents were "regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." The Supreme Court applied the dependent Indian community term again in United States v. McGowan, holding that the Reno Indian Colony, established on a tract purchased by the United States to provide lands in a permanent settlement for needy Indians scattered over the State of Nevada, qualified as Indian country. The Court emphasized that these Indians were receiving the same government services as reservation Indians, and that the land had been set apart for the Indians' use. In sum, based on these seminal cases incorporated into statute, the term dependent Indian community includes lands occupied by Indians that are functionally equivalent to reservations: lands set aside for benefit of Indians where Indian residents are eligible for federal services intended to benefit Indians.

The lower federal courts, deciding cases in recent years, have developed the factors enumerated in Sandoval and McGowan into a formalized test for finding land a dependent Indian community. These factors can be summarized as including:

1. whether the federal government or a tribe owns the land;
2. whether the land is predominantly inhabited or used by Native Americans;
3. whether there is a sufficient relationship of the people occupying the land to their tribe and the federal government;
4. whether the residents form a cohesive community; and
5. whether the lands have been set aside for the use, occupancy, and protection of dependent Native American people.

137. Id. at 48. The land, held under a Mexican treaty, failed to qualify as a reservation because it was held by the tribe in fee simple with no federal supervision or restrictions on alienation. Id.
138. Id. at 49.
139. Id. at 39.
140. 302 U.S. 535 (1938).
141. Id. at 538-39. (This case also involved application of federal liquor laws.)
142. Id.
143. F. COHEN, supra note 108, at 34.
Although all of these factors are relevant, they are not all of equal weight and each one does not have to be met in order for land to qualify as a dependent Indian community.\textsuperscript{145} The courts have emphasized the importance of the last requirement, saying that "the ultimate issue [is] whether the evidence shows that the area was established for the use, occupancy and protection of dependent Indians."\textsuperscript{146}

Applying this test in the lower forty-eight, courts have found a community not to be predominantly inhabited by Native Americans when only 16.3\% of the population was Indian,\textsuperscript{147} but have been satisfied when at least nineteen out of fifty-three heads of households in a housing project run by a tribal housing authority were Indian.\textsuperscript{148} The requirement of examining the relationship of the people to their tribe has been met in cases considering off-reservation Indian housing projects where the tribal government provided all available tribal services to the project.\textsuperscript{149} Furthermore, the community has been found to have the requisite relationship to the federal government when agencies are providing Indian programs (social services) to community residents under federal trust responsibility.\textsuperscript{150} Most of these cases have

\textsuperscript{(D.S.D. 1979). The Ninth Circuit has never decided a dependent Indian community case.}

\textsuperscript{145. United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986) (finding land to qualify as dependent Indian community even though court did not determine whether cohesiveness factor was met).}

\textsuperscript{146. United States v. Levesque, 681 F.2d 75, 77 (1st Cir. 1982).}

\textsuperscript{147. Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981).}

\textsuperscript{148. United States v. Mound, 477 F. Supp. 156, 159 (D.S.D. 1979). The court was judging race solely on the basis of names and noted that another 15 families with names of French extraction probably could be found to be Indian. \textit{Id}. The court concluded that "the exact percentage of Indian occupation [in the project] is fluid." \textit{Id}.}

\textsuperscript{149. United States v. South Dakota, 665 F.2d 837, 840-41 (8th Cir. 1981); United States v. Mound, 477 F. Supp. 156, 159-60 (D.S.D. 1979). In \textit{South Dakota} tribal services included a senior citizens program, a maternal and child health program, a canning program, a school busing program for Indian students in the project, and a tribal food stamp and commodities program. 665 F.2d at 840.}

\textsuperscript{150. See, e.g., United States v. Azure, 801 F.2d 336, 338-39 (8th Cir. 1986) (requirement met by Bureau of Indian Affairs ("BIA") roads and law enforcement); United States v. Levesque, 681 F.2d 75, 78 (1st Cir. 1982) (requirement satisfied by federal grants to tribe for tribal courts and law enforcement); United States v. South Dakota, 665 F.2d 837, 840 (8th Cir. 1981) (requirement met by Indian Health Service water and sewer facilities, garbage truck, and hospital, all BIA programs, and Housing and Urban Development subsidy to housing project under Indian housing program); United States v. Mound, 477 F. Supp. 156, 159 (D.S.D. 1979) (requirement met by Indian Health Service water and sewer and medical services, roads provided by BIA, fire protection and schools provided under joint agreement between BIA and town, and school bus service mostly underwritten by BIA).}
arisen either in settlements that are largely Indian in population\textsuperscript{151} or in housing projects operated by tribal housing authorities.\textsuperscript{152}

2. \textit{Indian Country in Alaska.} Tribes in Alaska, with a single exception,\textsuperscript{153} do not have reservations, and thus lack the major tribal land-base found in the lower forty-eight. Two types of restricted property, however, exist in Alaska: restricted townsite lots and Native allotments.\textsuperscript{154} Under the Alaska Townsite Act of 1926,\textsuperscript{155} many Alaska Natives have restricted deeds to the lots in villages underneath their homes.\textsuperscript{156} These lands, however, lie within villages, and thus are irrelevant to the regulation of hunting, since they are not hunting grounds. The allotment lands are both more extensive than restricted townsites and more strategically placed for the regulation of hunting. Nearly 10,000 Native Alaskans have applied for Native allotments.\textsuperscript{157} Under

\begin{itemize}
  \item \textsuperscript{151} United States v. Azure, 801 F.2d 336, 338-39 (8th Cir. 1986); United States v. Martine, 442 F.2d 1033 (10th Cir. 1971).
  \item \textsuperscript{153} A reservation was established by federal statute on the Annette Islands, in the Alexander Archipelago, for the use of the Metlakahtla Indians. See 48 U.S.C. § 358 (1982); see also D. Case, supra note 36, at 87.
  \item \textsuperscript{154} People of South Naknek v. Bristol Bay Borough held that restricted property in Alaska not within reservations does not benefit from a "presumption of no state jurisdiction," as do lands within the exterior of reservations. 466 F. Supp. 870, 877 (D. Alaska 1979) (per von der Heydt, C.J.). This "presumption" does not appear to exist in modern cases analyzing tribal and state jurisdiction and the Alaska case is an inexplicable aberration. Compare Langley v. Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985) ("Regardless, however, whether the lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country, and the district court's conclusion [federal, not state, government has jurisdiction over Indian country] was correct.") with Washoe Tribe of Nevada and California v. Greenley, 674 F.2d 816, 818 (9th Cir. 1982) (failing to allow state, not a party to district court action, to appeal declaratory judgment and injunction prohibiting enforcement of state hunting laws and regulations on off-reservation allotments). See also Native Village of Tyonek v. Puckett, No. A82-369, slip op. at 20-21 (D. Alaska Dec. 3, 1986) (Alaska tribal government possesses immunity from suit like that of any other Indian tribe in contiguous United States).
  \item \textsuperscript{156} D. Case, supra note 36, at 157-60.
  \item \textsuperscript{157} The statute authorizing Alaska Natives to receive allotments rested in obscurity for decades, during which time almost no Alaska allotment claims were submitted to the Bureau of Land Management ("BLM"). Most of the nearly 10,000 applications ever made under this law were submitted to BLM in the last few years before 1971, as it became clear that Congress in ANCSA would repeal the 1906 Allotment Act. Telephone interview with Bob Arndorfer, Bureau of Land Management, Anchorage (1987). The large number of these applications submitted in a short span of time has overwhelmed BLM, and thus most of these applications are still pending more than fifteen years later. \textit{Id.}
the 1906 Allotment Act, Alaska Natives could receive title to up to 160 acres of public land that they had used or occupied for five years or more.\footnote{158. Act of May 17, 1906, ch. 2469 § 1, 34 Stat. 197, \textit{repealed} by Alaska Native Claims Settlement Act of 1971 Pub. L. 92-203 § 181(a), 85 Stat. 710. For a more detailed explanation of the requirements for a valid allotment application, see D. CASE, \textit{supra} note 36, at 137-51.}

Thus, the allotments consist mostly of sites important for subsistence hunting or fishing, such as fish camps and trapping cabins. The allotment parcels, however, are scattered and intermittent, and, therefore, would create a checkerboard of Indian country if used as a basis for tribal jurisdiction. Nor do the allotments include even a fraction of the lands used or needed for village subsistence. Thus, although tribal governments could assert that these lands comprise Indian country, operating an effective hunting regulatory program would require tribal jurisdiction over a more extensive and contiguous territory.

Generally, the lands for several miles in all directions around each Native village are owned by the ANCSA village corporation.\footnote{159. ANCSA provided that the core township or townships where each village is located were withdrawn from entry under the public land laws, and also that the double ring of townships around the core townships was withdrawn. 43 U.S.C. § 1610 (1982). The village corporation selected its lands from among these withdrawn lands. \textit{Id.} § 1611(a). The amount each corporation could select varied, depending largely on the number of its shareholders. \textit{Id.} § 1613(a). \textit{But see id.} § 1611(b) (providing that the difference between 22 million acres and total acreage selected by village corporations shall be allocated to regional corporations which shall reallocate such surplus acreage on an equitable basis among the Native villages within the region). If bodies of water intruded to make insufficient land available, the Bureau of Land Management also withdrew additional lands “from the nearest unreserved, vacant and unappropriated public lands.” \textit{Id.} § 1610(a)(3)(A). Additional complications arose when the lands around the village were national park, national wildlife refuge, national forest, or Naval Petroleum Reserve lands in 1971. However, in general, village corporation lands surround the village, and most village corporations have exercised their limited selection discretion to get lands important for the village’s subsistence. \textit{See BUREAU OF LAND MANAGEMENT, ALASKA LAND STATUS MAP} (June 1986).}

These lands, easily accessible to the village, usually are used intensively for subsistence, although they do not include the village’s entire hunting territory.\footnote{160. \textit{See, e.g.,} S. PEDERSEN & M. COFFING, \textsc{Caribou Hunting: Land Use Dimensions and Recent Harvest Patterns in Kaktovik, Northeast Alaska} (ADF&G Subsistence Division Technical Paper No. 92, 1984); R. SCHROEDER & D. ANDERSON, \textsc{Kotzebue Sound Subsistence Resource Use Map Index and Methodology} (ADF&G Subsistence Division Technical Paper No. 130, 1986); L. STRATTON & S. GEORGETTE, 1985 \textsc{Copper River Resource Use Map, Index and Methodology} (ADF&G Subsistence Division Technical Paper No. 124, 1985).}

The question is whether these lands qualify as Indian country under the test for “dependent Indian communities.”\footnote{161. The following analysis also applies to ANCSA regional corporation land selections. In making selections, most regional corporations have followed a mixed
ANCSA village corporation lands surrounding remote villages, which are used for subsistence by Native village residents, should be considered to be dependent Indian communities. These lands clearly meet several factors used by the courts in determining that similar lands were dependent Indian communities. Since almost all residents of remote villages are Alaska Natives, it is indeed mostly Natives using the surrounding ANCSA corporation lands. The federal government provides a variety of services under programs intended to benefit Native Americans, ranging from subsidized housing to free medical care. Thus, Natives are just as dependent on the federal government for these services as are Indians in the lower forty-eight Indian communities. In the area of subsistence, the relationship with the federal government is even stronger, because the federal government has additional legal responsibilities to Natives under a whole series of federal laws protecting Native hunting for fur seals, whales, polar strategy, selecting some lands to gain title and thus protection for important subsistence areas that lie too far from villages to qualify for selection by village corporations, while using other selections to gain title to lands valuable for timber resources or mineral potential. Thus, for instance, NANA regional corporation has selected lands around Onion Portage in Kobuk Valley National Park because that land is an important fall caribou hunting area, and NANA has also selected the Red Dog mine site with a world class lead-zinc deposit for its profit potential. Interview with Walter Sampson, NANA Corporation (1986).

162. See supra note 4.

163. 24 C.F.R. § 905.102 (1987) (definition of Indian for Indian housing program includes "[a]ny person recognized as being an Indian or Alaska Native by a tribe, the government, or any state"); see also Eric v. Secretary of U.S. Dep't of Housing and Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978) (construes statute distributing federal funding for rural Alaska housing primarily for Alaska Natives under canons of construction for federal trust responsibility programs); D. CASE, supra note 36, at 195-272.

164. 42 C.F.R. § 36.1 (1987) (definition of "Indian" for Indian Health Services benefits includes "Indians in the continental United States, and Indians, Aleuts and Eskimos in Alaska").

165. By focusing only on the federal trust responsibility to oversee trust lands, one author has concluded that the relationship between the federal government and Alaska Native villages has been significantly changed by ANCSA. See Marston, Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test, 17 CORNELL INT'L L.J. 375, 398-99 (1984). Specifically, Marston concludes that "villages on land held by ANCSA corporations are not tribes within the meaning of traditional tests, but the federal government recognizes that these villages deserve treatment similar to that of tribes in Indian country in other states." Id. at 400. This ignores the substantial federal trust responsibilities in areas other than protection of Native land interests. Cf. D. CASE, supra note 36, at 263-64. Yet, it is exactly these sorts of social services, provided to Indians under the federal trust responsibility, which have satisfied this part of the dependent Indian community test in reported cases from the lower forty-eight. See, e.g., cases cited supra note 150.

bears, other marine mammals, and migratory waterfowl as well as subsistence hunting generally. Native residents also have an active relationship with their tribal governments, which administer a variety of federally funded programs. Furthermore, villages form cohesive communities, which make use of the surrounding village corporation lands.

The element of the dependent Indian community test examining whether the lands are owned by the federal or tribal government warrants detailed discussion, since ANCSA corporation lands are owned by neither. Reported federal cases from the lower forty-eight applying the dependent Indian community test have arisen either on federally or tribally owned lands — meeting the test — or on lands owned by non-Indians, which failed to qualify. Therefore, the courts have

172. In many remote regions of the state, tribal governments have assigned to regional nonprofit corporations such as Maniilaq, Kawerak, and Bristol Bay Native Association their right to receive federal funds allocated to tribal governments, thus pooling the funds available to each small village into a regional program. Membership of the regional nonprofits is composed of the region's tribal governments. The board of directors is made up of representatives from each member tribal government, who are responsible for the administration of these programs. See D. CASE, supra note 36, at 389-405. Such sharing of funds, which enables tribal controlled institutions efficiently to deliver services on a regional basis, should not affect the legal analysis.
173. See, e.g., SUBSISTENCE IN SOUTHWEST ALASKA, supra note 3, at 359-71.
175. Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (community where 95% of land deeded and only 16.3% of population Indian does not qualify as dependent Indian community).
never considered whether this part of the test could be met by lands of a non-tribal institution that were owned and managed by Natives.\textsuperscript{176} Although cases have listed this requirement as part of the test for a dependent Indian community,\textsuperscript{177} no reported federal case has held that land owned by individual Indians or by an Indian owned entity does not qualify under the test.

The final element examines whether the lands are set aside for the use, occupancy, and protection of dependent Native Americans. Certainly, the federal grant of these lands in ANCSA was intended to benefit and to protect Alaska Natives — the purpose clause of the statute declares as much.\textsuperscript{178} Nothing in ANCSA requires that the corporations allow actual use and occupancy of the lands by Native shareholders. Certainly Congress, however, expected,\textsuperscript{179} and most corporations in practice have, allowed Native shareholders freely to use corporation lands for subsistence and other purposes.\textsuperscript{180} Moreover, many corporations selected lands intensively used for subsistence by their Native shareholders, using ANCSA as a vehicle for Natives to gain local control and potentially exclusive use of subsistence hunting areas.

Congressional actions since 1971 have reaffirmed Congress' intent that lands were granted to ANCSA corporations for the benefit of Alaska Natives. Amendments to ANCSA have made it harder for Native corporations to lose their undeveloped lands that are being used for subsistence. For instance, ANCSA initially provided that

\begin{itemize}
\item \textsuperscript{176} The courts have held that summary judgment is not a proper mode to determine whether lands lie within a dependent Indian community. City of Sault Ste. Marie, Michigan v. Andrus, 532 F. Supp. 157, 165 (D.D.C. 1980) ("analysis of [the factors set forth in \textit{Martine}] calls for an extensive factor inquiry, and the court is persuaded that the necessity for such an inquiry precludes summary judgment"). Yet, clearly, if this single — and factually simple — factor were determining, land could be found not to be Indian country based on failing to meet this requirement alone. The fact that summary judgment is unavailable to determine whether lands qualify as a dependent Indian community tends to indicate that this part of the test either is not an absolute requirement, or that it may be met by ownership that is "Native American" but not federal or tribal ownership.
\item \textsuperscript{177} See, e.g., cases cited \textit{supra} note 174.
\item \textsuperscript{178} That clause states that "the settlement should be accomplished . . . in conformity with the real economic and social needs of Natives . . . with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b) (1982).
\item \textsuperscript{179} Congress determined the lands to be selected, taking into consideration "the land needed for ordinary village sites and village expansion, the land needed for a subsistence hunting and fishing economy by many of the Natives, and the land needed by the Natives as a form of capital for economic development." H. REP. No. 523, 92d Cong., 1st Sess. 2, \textit{reprinted in} 1971 U.S. \textit{CONG. \\& ADMIN. NEWS} 2192.
\item \textsuperscript{180} Interview with Willie Goodwin, Kikiktagruk Inupiat Corp. (1986); Interview with Walter Sampson, NANA Regional Corp. (1986).
\end{itemize}
corporation lands would be exempt from state and local property taxes only until 1991, twenty years after the enactment of ANCSA. Since the ANCSA conveyance process was proceeding slowly, and since ANCSA corporations might be unable to pay taxes assessed on these extensive but often monetarily unproductive assets, this tax exemption was extended in 1980 to last for twenty years from the date that the corporation received title to the lands. Additionally, Congress provided that the tax moratorium could be extended indefinitely at the corporation’s option, if the corporation placed its undeveloped lands into a land bank. Placing lands in the land bank also would protect them from loss for adverse possession or the satisfaction of a judgment. Amendments to ANCSA have also given Native corporations methods to maintain corporate control in Native hands. By majority shareholder vote, shareholders of a corporation may amend the articles of incorporation before December 18, 1991, to deny voting rights to any shareholder who is not a Native or a descendant of a Native and to grant the corporation the right of first refusal before any sale of corporation shares. By enacting these protections, Congress has clarified that these lands are intended to benefit Alaska Natives and should not be allowed easily to pass out of Native ownership.

In sum, a strong case can be made that ANCSA lands qualify as Indian country under the dependent Indian community test, but the issue will undoubtedly have to be tested in court. This article addresses the application of Indian country analysis to ANCSA corporation lands in some detail, both because such lands surround every Native village and because the detailed analysis of these lands provides the reader with a sense of the result of such analysis when applied to other lands. Ultimately, other non-corporate lands may be found to

184. 43 U.S.C. § 1636(c)(2)(A), (c) (1982). Other private landowners did not receive such extensive protective benefits if they placed their lands in the land bank. Cf. id. at § 1636(c)(1). Congress implicitly admitted that the provisions regarding land-banked ANCSA corporation lands altered state jurisdiction, by stating that the land bank provisions should not be construed as affecting the civil or criminal jurisdiction of the state, except for those provisions applicable to ANCSA corporation lands. Id. § 1636(c)(4)(A).
186. But see Marston, supra note 165, at 399 (concluding that since ANCSA lands are freely alienable, these lands were not set apart for the use, occupancy, and protection of Alaska Natives).
qualify as Indian country.\textsuperscript{187} The ANCSA lands, however, constitute a basic land base for tribes enacting hunting codes.

**B. Tribal Preemption of State Law**

Even on Indian country lands, however, a tribal government regulatory program does not necessarily preempt the operation of state law. A special preemption test determines whether tribal law, supported by federal law, preempts state law.\textsuperscript{188} Since tribal preemption

\textsuperscript{187} Sections of ANILCA setting aside many of the parks, preserves, monuments, and wildlife refuges among other purposes as habitat for subsistence resources while "grandfathering in" subsistence use of those areas may qualify as setting those lands aside for the use, occupancy, and protection of dependent Native people. See, e.g., ANILCA §§ 201-202, 16 U.S.C. § 431 (1982) (National Parks, Preserves, and Monuments), ANILCA §§ 302-303, 16 U.S.C. § 668dd (1982). Even if such federal lands qualify as Indian country, state game regulations may be applicable to those lands under the preemption analysis discussed below. That preemption analysis turns, in part, on whether any federal laws grant the state jurisdiction over Indian country lands. For federal lands such a statute exists — section 805 of ANILCA authorizes state management of federal lands if certain conditions are met. See 16 U.S.C. § 3115 (1982); see also infra discussion at notes 287-91 and accompanying text.

\textsuperscript{188} The Supreme Court has stated that there are, in fact, two separate preemption analyses in federal Indian law. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). A leading scholar of federal Indian law has labeled these two tests "geographical preemption" and "subject matter preemption" analysis. C. WILKINSON, supra note 91, at 93. The Court first developed and used geographical preemption analysis in Williams v. Lee, 358 U.S. 217 (1959). In Williams, the Court held that a state court could not hear a case brought by a non-Indian store-owner against Indian creditors for debts incurred at the store on the reservation, because the Navajo Nation had established a fully operational set of tribal courts to hear such cases. The Court explained that such an exercise of state court jurisdiction was barred, because "it would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." Id. at 220. In spite of this sweeping language, Williams does not carve out a judicially conceived sphere of exclusive tribal authority. Rather, the holding is rooted in federal statutes and treaties, interpreted under the canons of construction for statutes dealing with Indian and tribal rights. The Williams holding can be accurately summed up by saying that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id. at 220 (citing Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885) (emphasis added)). In Williams, the Court felt that if the power to govern themselves is to be taken away from the Indians, then Congress and not the state must do it. Id. at 223. Thus, geographical preemption analysis starts with a presumption of tribal jurisdiction in Indian country and searches applicable federal statutes dealing with Indian and tribal rights. For instance, in Williams, the Court found support for its ruling in the treaty with the Navajos, 15 Stat. 667, setting apart the reservation for their permanent home. Williams, 358 U.S. at 221. The Court noted that the State of Arizona had not assumed jurisdiction under the provisions of Public Law 280. Id. at 222-23. For a discussion of this statute, see infra notes 255-64. The Court also saw importance in the fact that the Indian Reorganization Act encouraged tribal governments and courts to become stronger (without mentioning that the
analysis involves interpreting and applying federal statutes, this discussion will first describe the canons of construction used to interpret federal statutes affecting the rights and powers of Indians and tribes before turning to the preemption analysis itself.

1. Canons of statutory construction. The canons for construing federal statutes dealing with Native Americans require that any ambiguities in such statutes are to be resolved so as to uphold the rights of Native Americans. Thus, when Congress acts to abolish Native American rights it must do so clearly and unequivocally, and rights created in legislation passed for the benefit of Native Americans are to be liberally construed.

Examining several cases gives an idea of how these rules work in practice. In *Menominee Tribe of Indians v. United States*, the Court considered whether the Menominees still had treaty hunting and fishing rights. Congress had passed the Menominee Termination Act of 1954, which “terminated” the federal trust relationship with the tribe, so that the tribe would receive no further federal subsidies. This statute also provided that after this termination, state law “shall apply to the tribe and its members in the same manner as . . . to other citizens and persons.” The Court held that this statute did not abrogate treaty hunting and fishing rights. Such an abrogation, the Court explained, would trigger a fifth amendment taking claim and

Navajos had declined to reorganize under that statute), *id.* at 220, and that the Bureau of Indian Affairs had “assisted in strengthening the Navajo tribal government and its courts.” *Id.* at 222. This sort of statutory analysis relying on powers not granted to the state in federal law, closely resembles the treatment of statutes under “subject matter preemption” analysis. *Cf.* McClanahan v. State Tax Comm’n, 411 U.S. 164 (1973).

Professor Wilkinson distinguished geographical preemption as based on law creating Indian country, while subject matter preemption involved examining federal statutes governing discrete substantive subjects. *C. WILKINSON, supra* note 91, at 93. For purposes of assessing tribal hunting regulations, the applicable geographic statute is ANCSA. The implications of ANCSA are discussed below in a discussion of tribal preemption, which conforms with the preemption analysis that Professor Wilkinson labels “subject matter preemption.” *See infra* notes 265-86 and accompanying text.


195. *Id.* at 412.
the Court found it "difficult to believe that Congress, without explicit
statement, would subject the United States to a claim for compensation."\textsuperscript{196}

In \textit{Bryan v. Itasca County}\textsuperscript{197} the question was whether Public Law 280,\textsuperscript{198} which provided that on specified Indian country lands the state laws "that are of general application to private persons or private
property shall have the same force and effect within . . . Indian coun-
try as they have elsewhere,"\textsuperscript{199} allowed the application of state taxes
and regulatory laws in those Indian country areas. The Court held
that state taxes and regulatory laws were not included.\textsuperscript{200} The Court
noted that Public Law 280 primarily dealt with the application of state
criminal laws, and that the provision regarding state civil jurisdiction
had been slipped in with virtually no legislative history.\textsuperscript{201} The Court,
therefore, explained that a more explicit statement would be needed
"if such a sweeping change in the status of tribal government and res-
ervation Indians had been contemplated by Congress."\textsuperscript{202}

In \textit{Santa Clara Pueblo v. Martinez},\textsuperscript{203} the Court was confronted
with a case of sex discrimination, an apparent violation of the Indian
Civil Rights Act of 1968.\textsuperscript{204} Although the Court found that this stat-
ute prevented tribes from denying the equal protection of the laws, the
only remedy mentioned was habeas corpus. Since Congress had not
waived tribal immunity from suit, the Court would not imply a cause
of action based on the statute in federal court.\textsuperscript{205}

\textbf{2. Preemption analysis.} The preemption analysis used in federal
Indian law differs from that used to analyze conflicts between federal
and state law, absent tribal involvement\textsuperscript{206} — tribal preemption anal-
ysis does not rely heavily on a search for expressions of congressional
intent.\textsuperscript{207} Rather, the analysis involves two parts, first examining the
federal statutory framework and then balancing the competing tribal,

\begin{itemize}
\item \textsuperscript{196} \textit{Id.} at 413.
\item \textsuperscript{197} 426 U.S. 373 (1976).
\item \textsuperscript{198} 28 U.S.C. § 1360 (1982).
\item \textsuperscript{199} \textit{Id.}, quoted in \textit{Bryan}, 426 U.S. at 384.
\item \textsuperscript{200} \textit{Bryan}, 426 U.S. at 390.
\item \textsuperscript{201} \textit{See id.} at 381.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} 436 U.S. 49 (1978).
\item \textsuperscript{204} 25 U.S.C. §§ 1301-1303 (1982).
\item \textsuperscript{205} 436 U.S. 49, 59 (1978).
\item \textsuperscript{206} Compare \textit{White Mountain Apache Tribe v. Bracker}, 448 U.S. 136, 143-44
\item \textsuperscript{207} \textit{New Mexico v. Mescalero Apache Tribe}, 462 U.S. 324, 334 (1983) (Court
explained that it has "rejected the proposition that [Indian subject matter] preemption
requires 'an express Congressional statement to that effect' " (quoting \textit{Bracker}, 448
U.S. at 144)).
\end{itemize}
TRIBAL HUNTING REGULATIONS

federal, and state interests at stake.\textsuperscript{208} For the first part of the test, courts examine federal law, using the rules of liberal interpretation applicable to Indian statutes\textsuperscript{209} and against a backdrop of Indian tribal sovereignty,\textsuperscript{210} to determine whether state jurisdiction "interferes or is incompatible with federal and tribal interests reflected in federal law."\textsuperscript{211} This statutory analysis involves examining federal laws "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."\textsuperscript{212} The second part of the test requires determining whether "the State interests at stake are sufficient to justify the assertion of State authority."\textsuperscript{213}

This rubric, however, does not fully describe the Court's actual approach in these cases. Understanding preemption analysis requires examining what the Court does, rather than what it says. In operation, this analysis involves searching for applicable federal statutes, which include statutes implicitly supporting exclusive tribal jurisdiction as well as any granting state jurisdiction. When the state, however, is attempting to apply its law to Indians in Indian country, the analysis begins with a presumption that state law is preempted, because to prevail in these cases the state must point to a federal statute affirmatively granting state jurisdiction. By contrast, exclusive tribal jurisdiction will be upheld even if its only support in federal law is by negative implication, that is, when federal statutes grant state jurisdiction in situations other than the controversy at bar but federal law is silent concerning the factual situation before the court.

The examination of several cases illustrates and clarifies the actual operation of the preemption test. In \textit{McClanahan v. State Tax Commission},\textsuperscript{214} the Court was faced with the task of determining whether an Indian living and working on the Navajo reservation was

\textsuperscript{208} Bracker, 448 U.S. at 145-51.
\textsuperscript{210} See, e.g., id. at 172. The Court concluded:

When this canon of construction is taken together with the tradition of Indian independence... it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general supervision. \textit{Id.} at 174-75.

\textsuperscript{211} Mescalero Apache Tribe, 462 U.S. at 334; accord Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. --, 106 S. Ct. 2305, 2309-10 (1986); Bracker, 448 U.S. at 145 (describing the test as "a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.").

\textsuperscript{212} Bracker, 448 U.S. at 144-45.
\textsuperscript{213} Mescalero Apache Tribe, 462 U.S. at 334.
\textsuperscript{214} 411 U.S. 164 (1973).
exempt from state income tax liability. The Court noted that the treaty with the Navajos was silent concerning the application of state law or taxes, but found support for preemption of state law in a treaty provision setting aside reservation lands for exclusive Navajo use. The Court liberally interpreted the implications of this treaty provision, citing three factors: (1) canons of construction interpreting doubtful expressions in favor of the Indians, (2) the tradition of Indian independence tracing back to *Worcester v. Georgia*, and (3) consistent congressional assumptions that states lack jurisdiction over reservation Indians. These three factors would, in fact, warrant expansive interpretation of any statute granting or recognizing Indian rights to Indian country lands.

At the same time, the Court found support for preemption of state law in the negative implication of two federal laws that chose not to grant state jurisdiction in this situation. The Arizona Enabling Act contained language clarifying that its provisions did not limit the state's power to tax Indian property outside the reservation. From this, the Court implied that Arizona did not have the power to tax on the reservation. The Buck Act governing state taxation in federal enclaves contained a clarification which explained that its provisions did not authorize state taxation of "any Indians not otherwise taxed." The legislative history, as the Court explained, made clear that this phrase referred to reservation Indians. The Court noted that this provision limiting the scope of the statute would not have been inserted if the state had the power to assess such taxes anyway, and concluded that implicit in this section was a congressional assumption that the state lacked such power.

Thus, both of these statutes grant the state jurisdiction over certain situations, but do not extend state jurisdiction over the controversy before the Court. The Court used these statutes, which did not explicitly speak to the situation before the Court, to support the conclusion that state law was preempted. This sort of analysis basically

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215. Id. at 173-74.
216. Id. at 174.
220. *McClanahan*, 411 U.S. at 175-76.
222. Id. § 109.
225. Id. at 181. Similarly, in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng’g (Wold II), the Court concluded that since the state’s actions were
comes down to a presumption of exclusive tribal jurisdiction in Indian country, and a search for some statute explicitly granting the state jurisdiction. Therefore, absent a statute fairly clearly indicating state jurisdiction, state law is preempted.

A later case, *White Mountain Apache Tribe v. Bracker*, 226 emphasized the second part of the test involving balancing tribal, federal, and state interests. *Bracker* involved applying state motor vehicle and fuel taxes to trucks operated by a non-Indian contractor harvesting tribal timber on the reservation.227 Tribal timber receipts funded tribal government.228 Since tribal timber harvests were comprehensively regulated by the Bureau of Indian Affairs to assure that Indians receive maximal stumpage value, profit, and jobs,229 the Court said that there was "no room for [state] taxes in the comprehensive federal regulatory scheme."230 The Court found that state taxes would substantially interfere with tribal and state interests in maximizing timber revenues but could identify no legitimate state regulatory interest.231 Thus, the Court introduced into the preemption analysis an examination of the effect of state law on tribal, federal, and state interests.

Several Supreme Court cases have applied this preemption analysis to tribal hunting codes. In *New Mexico v. Mescalero Apache Tribe*, 232 the Court considered whether the state could impose its hunting seasons and bag limits, concurrently with tribal regulations, on hunting by non-Indians on tribal reservation lands.233 The tribe, with extensive assistance from the Bureau of Indian Affairs, was developing sport hunting on the reservation, both to raise revenue by selling tribal hunting licenses and also to provide jobs for its people.234 State game regulations conflicted with, and often were more restrictive than, tribal rules.235 Federal law supported tribal jurisdiction over hunting on tribal lands by making it a federal offense to violate tribal hunting codes or to hunt without tribal consent.236 Since most of the fish and

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227. *Id.* at 138-40.
228. *Id.* at 138 (timber operations accounted for more than 90% of the tribe's annual profits).
229. *Id.* at 146-47.
230. *Id.* at 148.
231. *Id.* at 149-50.
233. As the Court explained, "[n]umerous conflicts exist[ed] between state and tribal hunting regulations." *Id.* For example, the tribe allowed a hunter to kill a buck and a doe, whereas the state permitted the taking of a buck only. *Id.* at 329.
234. *Id.* at 327-29.
235. *Id.* at 329.
236. *Id.* at 337-38.
game did not migrate off the reservation.\textsuperscript{237} New Mexico could neither point to any state regulatory function that would be interfered with, nor any off-reservation effects warranting state regulation.\textsuperscript{238} The Court held that state law was preempted, even in its application to non-Indian hunting.

In \textit{Montana v. United States},\textsuperscript{239} the issue was whether Montana could regulate fishing by non-Indians on state-owned lands (the beds of navigable waterways) within reservation boundaries.\textsuperscript{240} In order to regulate non-Indians on non-Indian lands, the Court held that the tribe must show "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."\textsuperscript{241} Since the tribe was not historically dependent on fishing, the Court did not find any such effects justifying tribal jurisdiction.\textsuperscript{242} The federal statutes that had supported exclusive Mescalero Apache jurisdiction did not help the Crow Tribe on non-Indian lands, because those statutes do not apply on such land.\textsuperscript{243} The Court upheld state, rather than tribal, jurisdiction.

Only in \textit{Puyallup Tribe, Inc. v. Department of Game of Washington (Puyallup III)},\textsuperscript{244} did the Supreme Court allow a state to regulate hunting or fishing by Indians in Indian country. That decision can only be understood in its historical context, as one battle in the long war over Pacific Northwest Indian treaty fishing rights. That dispute over Indian treaty fishing rights went to the United States Supreme Court twice regarding Indians' off-reservation fishing rights\textsuperscript{245} before the litigants reached the question of whether the state could limit Indian take of steelhead trout on non-Indian-owned lands \textit{within} reservation boundaries. The treaty reserved to the Indians the right to take

\begin{itemize}
\item \textsuperscript{237} \textit{Id.} at 342.
\item \textsuperscript{238} \textit{Id.} at 341-42.
\item \textsuperscript{239} 450 U.S. 544 (1981).
\item \textsuperscript{240} \textit{Id.} The Court summarily upheld that portion of the Ninth Circuit's opinion holding that the tribe did have jurisdiction to prohibit nonmembers from hunting or fishing on land owned by the tribe or held in trust by the United States for the tribe. \textit{Id.} at 557.
\item \textsuperscript{241} \textit{Id.} at 566.
\item \textsuperscript{242} \textit{Id.} Montana had been regulating such fishing for years, until the Crow Tribe passed a resolution barring non-tribal members from hunting and fishing on the reservation. \textit{Id.} at 564 n.13.
\item \textsuperscript{243} \textit{Id.} at 558-63; see also \textit{Fort Laramie Treaty of 1868, 15 Stat. 649 (1868)}.
\item \textsuperscript{244} 433 U.S. 165 (1977).
\item \textsuperscript{245} Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II); Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968) (Puyallup I).
\end{itemize}
fish off the reservation "in common with" state citizens. In Puyallup I, the Court held that the state could impose reasonable and necessary conservation measures on off-reservation Indian treaty fishing. In Puyallup II, the Court directed that state courts fairly apportion the off-reservation steelhead between Indian and non-Indian fishers. Only when the litigation returned for the third time was the Court asked to consider whether the state could impose an overall limit on Indian fishing on the reservation. The Court had already established that both Indians and non-Indians had a right to share in the resource, and the steelhead on the reservation migrated upriver off the reservation so that fish on the reservation were part of this shared resource. The Court noted that the Indians could, in theory, take all of the fish on-reservation, and leave none to migrate beyond the reservation’s boundaries. This would conflict with the treaty, by allowing the Indians to take more than their fairly apportioned share of off-reservation fish. The Court also found that the state had an important conservation interest in preserving fish stocks. Carefully noting that Washington was not trying to allocate the catch among the Indians, but was only setting an overall limit on the fish taken by tribal members, the Court upheld the state’s limit. The case, however, must be read carefully, recognizing that it turns on the uniquely shared treaty right to a migratory fish resource.

The discussion will now apply this preemption analysis to determine whether implementation of tribal codes would preempt state game laws on Indian country in Alaska. Federal laws will first be examined to determine whether they support or undercut the exercise of state jurisdiction. Then the competing state and tribal interests will be outlined.

a. Statutory analysis. Since very few tribes in Alaska have enacted regulatory schemes, the courts have had no chance to assess whether federal law supports or undercuts exclusive tribal jurisdiction,

247. 391 U.S. at 399.
248. 414 U.S. at 48-49.
250. Id. at 176.
251. Id. at 176-77
252. Id. at 177.
253. Id. at 178.
using modern preemption analysis. Thus, no statute can automatically be excluded from consideration and, therefore, several must be analyzed.

i. Public Law 280. Congress passed Public Law 280 in 1953 to deal with a situation of "lawlessness" that was perceived to exist on reservations where weak or impoverished tribes were unable to provide effective tribal justice systems. The primary object of this statute, which only applies to specified reservations and Indian country in specified states, including Alaska, was to subject Native Americans in those Indian country areas to state criminal law. The statute, however, also gives state courts jurisdiction over "civil causes of action" in those Indian country areas and declares that "civil laws . . . of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." held that the provision concerning civil jurisdiction was intended only to provide Indians with a forum for resolving legal disputes. The Supreme Court in that case held that Public Law 280 subjected those specified Indian country lands to state criminal but not state regulatory laws. Cases since have clarified this distinction between criminal laws that do apply on specified Indian country areas and regulatory laws that do not. Criminal laws are those which completely outlaw a given activity, while regulatory laws restrict the terms and conditions under which that activity may take place.

254. There are some decisions from before the modern era considering the extent of territorial governmental jurisdiction over Alaska Natives. For a discussion of these cases see Rural Alaska Community Action Program, Inc., Toward Understanding: A Positive View of Federal-State-Tribal Relations 54-65 (Mar. 1986). None of these cases employed modern preemption analysis, and thus their continued validity can be questioned.


257. Id. at 380.


260. Id. at 383.

261. Id. at 380-82.

TRIBAL HUNTING REGULATIONS

Under Public Law 280 it is irrelevant whether the state chooses to use punitive penalties designated as "criminal" or to assess compensatory "civil" fines. Public Law 280's distinction between criminal and regulatory does not turn on the nature or purpose of the penalty used in enforcement actions. Thus, for instance, a state law providing criminal fines for violations of restrictions on bingo operations would be "regulatory" under Public Law 280 as long as bingo operations are allowed in some circumstances but not in others.263

Public Law 280 does not grant the state jurisdiction to apply state regulatory laws in Indian country. Under Public Law 280's distinction between regulatory laws and criminal laws, hunting laws clearly qualify as "regulatory" in spite of the criminal nature of the penalties that the state chooses to impose for certain hunting violations.264 Thus, Public Law 280 does not give the state jurisdiction over hunting in Alaska Indian country.

ii. ANCSA. The Alaska Native Claims Settlement Act ("ANCSA")265 culminated one stage in the struggle for protection of Alaska Native interests. In the 1960s, Native claims in Alaska based on aboriginal title had not been litigated, but it appeared that Natives would be able to establish aboriginal title rights to most, if not all, of the state.266 To meet the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims," and to accomplish that settlement "rapidly, with certainty, [and] in conformity with the real economic and social needs of Natives, without litigation," Congress enacted ANCSA.267 This legislation accomplished two important tasks: (1) it extinguished all claims to Alaska lands based on aboriginal title; and (2) it granted money and land selection rights to a set of corporations established pursuant to the Act, the stock of which is held by Natives throughout the state.268

264. The Ninth Circuit has discussed the applicability of Public Law 280 to hunting regulations. In United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977), the Ninth Circuit contrasted that case, involving possession of fireworks with "other regulatory schemes such as hunting or fishing where a person who wants to hunt or fish merely has to pay a fee and obtain a license." Id. at 1364.
267. 43 U.S.C. § 2(a), (b) (1982).
268. 43 U.S.C. §§ 1601-1628 (1982). The stock of the corporations cannot be sold to non-Natives for 20 years from the date of the Act. Id. §§ 1606(h), 1607(c).
Congress chose to give settlement lands and monies to these corporations, rather than to Alaska Native tribal governments. It did so, not to affect the powers of tribal governments, but to ensure that all Natives, irrespective of the tribes to which they belong or the villages in which they reside, share equitably the revenues produced from these lands. The fact that tribes are not owners of lands given in the settlement, however, does not automatically usurp tribes’ governmental rights to regulate the use of those lands, nor does it automatically mean that state law can apply there.

ANCSA cannot be read as a repudiation of tribal sovereignty in Alaska. The statute neither addresses tribal sovereignty, nor does it contain the explicit language that the courts require to effect a revocation of Indian rights under the canons for construction of Indian statutes. On the contrary, section 2(c) of ANCSA states:

\[\text{[N]o provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska.}\]

Moreover, as federal policy has shifted towards strengthening tribal government in the last fifteen years, statutes since ANCSA uniformly have extended to Alaskan tribal councils the same benefits and powers.

269. 43 U.S.C. §§ 1601(b), 1606(i), 1606(j) (1982); see also H.R. No. 92-523, reprinted in U.S. CODE CONG. & ADMIN. NEWS 2192, 2198-99 (1971) (“Although twelve regional corporations are contemplated, a substantial portion of the funds received by them must be passed on to the village level. Moreover, the funds used at the village level must be used for the benefit of all residents of the Village.”).

270. See supra text accompanying notes 206-53. Thus, for instance, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), state hunting bag limits were preempted, even as applied to non-Indian deer hunting on tribally owned lands, while in Montana v. United States, 450 U.S. 544 (1981), the tribe was not allowed to regulate non-Indian fishing on Indian country lands that were not tribally owned absent a showing of important tribal interests at stake. Thus, tribal land ownership can factor heavily in the interest analysis portion of tribal preemption analysis. Alaska tribes can easily meet Montana’s required showing of such important tribal interests, given the importance of subsistence to village residents’ cultural heritage and economic survival. Cf. Montana, 450 U.S. at 566 (Crow Indians not so dependent on fishing that non-Indian fishing would threaten tribe’s political or economic security so as to justify tribal regulation). Such a showing would, however, complicate the subject matter preemption analysis for an exercise of tribal sovereignty on these non-tribal lands.


as have been given to Indian tribes. For example, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act, the Indian Health Care Improvement Act, and the Indian Child Welfare Act of 1978 each define "Indian tribe" as including any Native villages, groups, or corporations as defined in ANCSA. Through these statutes and ANCSA, Congress clearly is promoting the sovereignty and self-determination of Native Alaskans. Indeed, the tribal governments are even treated as sovereign states for federal tax purposes.

In this context, it is clear that ANCSA did not constitute a repudiation of Alaska tribal sovereign powers or a grant of state jurisdiction over ANCSA corporation lands.

In fact, section 21(d) of ANCSA, by negative implication, supports a finding that state law is preempted on ANCSA corporation lands. This section, dealing with the taxation of corporation lands, provides:

Real property interests conveyed, pursuant to this [Act], to a Native . . . Corporation . . . which are not developed or leased to third parties . . . shall be exempt from State or local property taxes for a period of twenty years from the vesting of title pursuant to [ANILCA] or the date of issuance of an interim conveyance or patent, whichever is earlier . . . .

This section gives the state limited jurisdiction over ANCSA corporation lands: the state may impose property taxes on the lands once twenty years have passed after the corporation receives title. But the power to tax is not equivalent to the power to regulate. Neither section 21(d) nor any other section of ANCSA grants the state regulatory jurisdiction over such Indian country lands after twenty years or at any time. By negative implication, then, state regulations are preempted on ANCSA lands.

In enacting ANCSA, Congress in no way intended to impair tribal rights. Although at first blush section 2(b) seems to contain some anti-tribal sentiments, a closer scrutiny reveals that it does not. Section 2(b) provides: "the settlement should be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship." The canons for construction of Indian statutes require that any statute extinguishing Indian rights

274. Id. § 450-450n (1982).
275. Id. §§ 1601-1680 (1982).
276. Id. §§ 1901-1963 (1982).
279. Id. § 1601(b) (1982).
must do so explicitly.\textsuperscript{280} It is, therefore, especially important to focus clearly on the specific language of this section.

Section 2(b) addresses only the effect of the settlement. It discusses how Congress intends a settlement to be carried out for claims based on Alaska Natives' aboriginal title rights. It says nothing about institutions or rights (such as rights to tribal sovereign government), which Alaska Natives may have independent of, or in addition to, any aboriginal land rights. It is a statement only about institutions, rights, privileges, or obligations established by ANCSA. Tribes and tribal powers were not established by ANCSA — they predate the settlement. The statute does not state that any existing institutions, rights, privileges, or obligations are altered or abolished.

The statement in section 2(b) that the settlement should not establish any "permanent racially defined institutions" in no way affects tribal rights or powers. Tribal rights are not "racially defined."\textsuperscript{281} The Supreme Court has made clear that tribal membership is a political, not a racial, status.\textsuperscript{282} This status is rooted in the federal trust responsibility, which creates a special relationship between the federal government and tribes.\textsuperscript{283}

The statement that the settlement should not create a "reservation system,"\textsuperscript{284} does not impair tribal powers either. Reservations are established by treaty, executive agreement confirmed by statute, or by executive withdrawal, setting aside land held by the United States in trust for the tribe. As one kind of Indian country, it is land over which the tribe has limited sovereign powers. On a reservation, a tribe

\textsuperscript{280} See supra notes 189-205 and accompanying text.

\textsuperscript{281} D. CASE, supra note 36, at 17.

\textsuperscript{282} Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); United States v. Antelope, 430 U.S. 641 (1977); Morton v. Mancari, 417 U.S. 535 (1974). In ANCSA, Congress defined the class of people who would receive stock and other benefits under the statute in racial terms — in terms of a quantum of Alaska Native blood — in order quickly and definitively to define the recipient class. Thus, this statement in section 2(b) that the settlement should not create permanent racially defined institutions, rights, privileges, or obligations must refer to the fact that restrictions on stock lift after 20 years.

\textsuperscript{283} See supra notes 115-30 and accompanying text.

\textsuperscript{284} 43 U.S.C. § 1601(b) (1982). Other sections of ANCSA also state that Congress did not intend ANCSA lands to be reservation lands. Section 2(g) of ANCSA states that the term "Indian reservation" shall include ANCSA lands only for the purpose of federal loan and grant programs. \textit{Id.} § 1601(g). The legislative history of this section clarifies that, "[t]he lands granted by this Act are not ‘in trust’ and the Native villages are not Indian ‘reservations.’" S. REP. No. 746, 92d Cong., 1st Sess. 40 (1971). Thus, Congress did not wish ANCSA corporation lands to be subject to the same oversight and restrictions on alienation as tribal trust lands. This language, however, does not say that Native villages are not Indian country, only that they do not qualify under the "reservation" branch of the three-way test for Indian country. Cf. supra text at notes 132-34.
has a certain amount of authority as the predominant, and sometimes nearly exclusive, landowner, while at the same time it possesses other powers as a government with jurisdiction over the same land. Since ANCSA is land settlement legislation, this language about a "reservation system" refers only to Congress' decision that ANCSA lands would not be held in trust for the Natives, but rather, would be given free of trust restrictions in fee to the corporations. Furthermore, since ANCSA addresses land ownership patterns and does not discuss tribal sovereignty issues, this statement cannot be read as a blanket congressional statement that Alaska tribal governments should not have the sovereign powers that lower forty-eight tribes have on their reservations.

Section 2(b) also states that the settlement should be accomplished without "creating . . . a lengthy wardship or trusteeship." This language too refers to Congress' choice to give settlement lands to ANCSA corporations in fee, rather than setting aside lands in trust for tribal governments. The fact that this language refers to trusteeship with regard to lands, rather than any other aspect of the federal trust relationship with Alaska Natives, is clarified in section 2(c) of ANCSA. That section states that ANCSA does not affect any of the federal government's trust responsibilities to Natives. Since section 2(c) reaffirms federal trust responsibilities, which include the responsibility to protect tribal governments from state encroachment, the language in section 2(b) barring creation of a lengthy wardship or trusteeship must be understood as referring to Congress' decision that settlement lands will be held in fee and not in trust.

Thus, upon careful reading, it is clear that neither section 2(b) nor any other section of ANCSA limits or abolishes tribal sovereign powers in Alaska. ANCSA was enacted solely for the purpose of settling title to these lands. The only jurisdiction granted to the state by this Act is the power to tax ANCSA lands. Because ANCSA does not grant regulatory powers to the state, by negative implication, ANCSA supports a finding that state law is preempted as to ANCSA lands.

In sum, in ANCSA, Congress chose not to cede settlement lands to tribal governments, thus withholding from Alaskan tribal governments the power that automatically would follow from making them major landowners. The statute does not, however, contain any clear

286. Section 2(c) reads: "[N]o provision of this Chapter shall replace or diminish . . . any obligation of the United States . . . to protect and promote the rights and welfare of Natives . . . ." 43 U.S.C. § 1601(c) (1982). This clearly refers to federal trust responsibilities to Natives, because the statute goes on to direct a report from the Secretary of the Interior to Congress on "all Federal programs primarily designed to benefit Native people . . . ." Id. Programs primarily designed to benefit Native Americans involve the federal trust responsibility.
statement limiting or abolishing tribal sovereign powers in Alaska. Nor does it grant the state jurisdiction over such lands. Furthermore, by negative implication, section 21(d) of ANCSA may support a finding that state law is preempted.

iii. ANILCA. Title VIII of ANILCA provides that the State of Alaska will be allowed to manage fish and game on public lands only if the state passes “laws of general applicability” guaranteeing certain protections for subsistence. The statute thus contemplates that game will be managed under state law on public lands, if the state can meet the terms set in ANILCA. Public lands, however, are clearly defined in section 102(3) of ANILCA as federally owned lands and do not include private Native allotments or ANCSA lands. Thus, title VIII does not grant the state any right to manage game on these Indian country lands. In fact, by affirming state game management powers on federal lands but not on non-federal Indian country lands, the statute can be read as undercutting, by negative implication, the state’s jurisdictional claims.

This provision in title VIII of ANILCA has negative implications that are similar to the negative implications in the Arizona Enabling Act relied on by the Supreme Court in McClanahan. In that case, the Court found state taxes could not apply to Navajos living on the reservation, because the Arizona Enabling Act stated only that the state could tax Indians off the reservation. This provision in the Arizona Enabling Act is parallel to title VIII of ANILCA, which similarly allows the state to regulate on some non-Indian country lands, but which is silent about whether state law can be applied on Indian country lands.

Furthermore, tribal jurisdiction over hunting is consistent with the spirit of title VIII. In ANILCA, Congress expressed reservations about the state’s desire or ability to protect subsistence adequately. These reservations made it necessary to set certain conditions on state management to protect subsistence. Congress built into title VIII provisions, such as fish and game advisory committees, regional councils,

287. 16 U.S.C. § 3115(d) (1982). The protections for subsistence include giving subsistence a priority over other consumptive uses of fish and game and implementing the local advisory committee and regional council system. See supra note 43.


289. Nor does the statute’s statement that state management will proceed under “laws of general applicability” mean that the State of Alaska has jurisdiction over Indian country lands. Even state laws of general applicability do not reach lands over which the state does not have jurisdiction, such as Indian country lands. Thus, state game laws can be laws of general applicability without reaching Indian country, and title VIII does not recognize state jurisdiction over hunting on nonfederally owned Indian country lands.

TRIBAL HUNTING REGULATIONS

and subsistence resource commissions,\footnote{16 U.S.C. § 3118 (1982).} to ensure involvement by rural residents in writing hunting regulations applicable to subsistence. Tribal jurisdiction is merely another tool for village residents to gain such local control and thus is completely consistent with the statute.

In conclusion, the State of Alaska can find no support in Public Law 280, ANCSA, or ANILCA for applying its hunting regulations on ANCSA corporation lands. In fact, by negative implication, section 21(d) of ANCSA and section 805 of ANILCA support exclusive tribal jurisdiction and the preemption of state law.

b. Interest analysis. The second part of the tribal preemption test, examining the tribal, federal, and state interests at stake,\footnote{292. See supra at notes 226-31 and accompanying text.} strongly supports tribal jurisdiction. As section II has shown, subsistence hunting is critical to the economic and cultural survival of remote Native villages.\footnote{293. See supra at notes 2-37 and accompanying text.} Furthermore, given that the needs and values of Native subsistence hunters differ substantially from those of sport hunters, local tribal control becomes important to achieve culturally appropriate rules for subsistence hunters.\footnote{294. For tribes to assert jurisdiction over hunting by non-tribal members, such a showing will be necessary. See Montana v. United States, 450 U.S. 544 (1981).} The state also has interests to weigh in the balance, since many subsistence resources migrate beyond the boundaries of Indian country. This interest, which might justify a state overall limit on tribal take of game,\footnote{295. Cf. Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977) (Puyallup III). Unlike the State of Washington in Puyallup III, however, the State of Alaska cannot point to any provision of federal law supporting such an exercise of state jurisdiction. Without such statutory support, the state's interest in limiting tribal game take would be insufficient to meet the tribal preemption test.} would never, however, justify state involvement in allocating the take or restricting hunting methods and means of village members.

This discussion illustrates that plausible arguments can be made to show state game laws are preempted in Alaska Indian country. As the reader can see, however, it is difficult to be sure how the courts will construe the applicable statutes, especially given the uncertainties inherent in the canons for construction of statutes affecting Native American rights. Given the political heat swirling around this issue, surely none of the parties involved will agree to any resolution short of litigation.

291. 16 U.S.C. § 3118 (1982). There is a commission for each national park or monument where subsistence is permitted. These commissions, which must include some members who engage in subsistence in the park or monument, are to draw up a program for subsistence hunting within the park or monument, and to submit it to the Department of the Interior. Id. § 3118(a). Interior can only reject the program for certain specified reasons. Id. § 3118(b).

292. See supra at notes 226-31 and accompanying text.

293. See supra at notes 2-37 and accompanying text.

294. For tribes to assert jurisdiction over hunting by non-tribal members, such a showing will be necessary. See Montana v. United States, 450 U.S. 544 (1981).

295. Cf. Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977) (Puyallup III). Unlike the State of Washington in Puyallup III, however, the State of Alaska cannot point to any provision of federal law supporting such an exercise of state jurisdiction. Without such statutory support, the state's interest in limiting tribal game take would be insufficient to meet the tribal preemption test.
V. CONCLUSION: ASSESSING THE OPERATION OF TRIBAL HUNTING CODES

The beginning of this article discussed the subsistence needs of rural Native villages and the ways in which current state game management fails to respond to those needs. This discussion showed why villagers are unhappy with the status quo and are likely to push for change. Change can occur on two fronts: state game management can be reformed to make it more sensitive, responsive, and adaptive to village needs; or as sections III and IV of this article suggest, the villages can choose to opt out of state game management by adopting tribal game codes.

There are several factors inducing villages to try reforming the state system, rather than striking out on their own with tribal regulations. Writing and enforcing tribal game codes will require mobilizing resources that these small communities may find daunting. Implementing such systems also will involve substantial legal uncertainty. Assuming that the state will resist such efforts, Native villages that choose to write and enforce tribal game codes will need to be prepared for extensive litigation to clarify jurisdictional issues. Village hunters must have the courage to stick by their tribal rules in spite of state enforcement efforts while the legality of these regulations is being contested in the courts.

Simultaneous efforts to reform state game management and to implement tribal game codes are not necessarily inconsistent village strategies. Most likely, some villages will pursue one route while other Native communities explore alternative approaches. Some villages will be more militant than others, but even the most passive will watch the efforts of more active communities with great interest.

Efforts to reform the state's management system are already under way. Such reform efforts rely heavily on litigation brought to

296. See supra section II.

297. It is important that the promises of tribal hunting jurisdiction not be oversold in the villages. As the above legal analysis shows, there are many uncertainties about tribal hunting jurisdiction. If the State of Alaska resists the idea of tribal hunting regulation vigorously, jurisdictional disputes could be bogged down in the courts for decades. Even if tribal advocates win such court battles, tribal rights are not as unlimited as the commonly misused term “sovereignty” implies. Tribes may not be able to establish Indian country jurisdiction over anywhere near all the lands they have traditionally used for subsistence.

298. For instance, the Village of Gambell has been working on drafting a village walrus hunting ordinance. Telephone interview with James Bamberger, Alaska Legal Services Corporation, Anchorage Statewide Office (1986). Simultaneously, Native leaders in Kotzebue, through their local fish and game advisory committee, are trying to get the Board of Game to review its regulations for compatibility with the needs of subsistence hunters in Northwest Alaska. REGULATION REVIEW, supra note 83.
TRIBAL HUNTING REGULATIONS

obtain compliance with the guarantees of ANILCA's subsistence provisions. The controversy over passage of the new subsistence hunting law showed that subsistence cannot obtain protection in the state's political arena, given the dominance of sport hunting interests there. Litigation is already testing state compliance with ANILCA's substantive requirement for a real subsistence priority. Further reform efforts could focus on the potential for improving state compliance with ANILCA's procedural requirements for effective local fish and game advisory committees and regional councils.

To some degree, village success in reforming state game management may diffuse pressure for tribal game management systems. Given the tremendous effort that would be necessary to implement tribal game codes, villages might not try this approach if state game regulations begin better to fit village needs. On the other hand, the State of Alaska, responding to the very real political clout of state sport hunters, may find ways to resist or delay reform efforts. Such resistance will only increase pressure in the villages to opt out of the state management system and increase the likelihood that Alaska, sooner or later, will see the implementation of tribal hunting codes. If, as this article suggests, the courts uphold tribal codes as preemptive of state game law on Indian country, Alaska will have to make its peace with tribal hunting regulation.

Many readers may find the thought of Native hunting regulation disquieting. Bad publicity in the urban press about Native game violations leads many to believe that Native hunters cannot be trusted to conserve game. Yet, several cooperative regulatory schemes placing substantial responsibility on Native hunters are already in place in Alaska. The federal government is undertaking formal cooperative

299. See, e.g., Bobby v. State, No. A84-544 (D. Alaska). A full discussion of the complexities of the subsistence priority is beyond the scope of this article.

300. See supra notes 44-53 and accompanying text.
management for bowhead whales\textsuperscript{301} and migratory birds\textsuperscript{302} Both efforts have not always proceeded smoothly,\textsuperscript{303} but on the whole have been successful from a conservation standpoint.\textsuperscript{304} In addition, the federal government, in managing marine mammals, has not found it necessary to implement such controls as bag limits, seasons, or restrictions on methods of hunting to keep Native subsistence take at acceptable levels.\textsuperscript{305} In effect, since only the use of marine mammal products is restricted\textsuperscript{306} and not the amount of the take, the government is relying, in large part, on the conservation values of Native hunters enforced through traditional law to manage marine mammal resources such as polar bears, seals, walruses, and beluga whales.

There are, however, some very real practical problems in implementing a checkerboarded system of state and tribal jurisdiction. Borders of ANCSA corporation lands run in straight lines across the map, not following any natural features. They are unmarked, and most hunters have no idea where those borders are located. Both migratory animals and the hunters pursuing them are likely to cross between Indian country lands and lands under state jurisdiction. If tribal and state rules diverge widely, hunters on the land will have to know the exact location of boundaries to determine which code applies. Similarly, in any enforcement actions the prosecution will also need to be

\textsuperscript{301} 50 C.F.R. §§ 230.70-.77 (1986). The National Oceanic and Atmospheric Administration has a Cooperative Agreement with the Alaska Eskimo Whaling Commission ("AEWC"), a group of Eskimo whaling captains. \textit{Id.} § 230.70. Each year the International Whaling Commission sets a limit on the number of bowhead whales which can be taken by Alaska Native whalers for subsistence. The United States has agreed that the Whaling Commission will allocate the extremely limited number of whales among the bowhead whaling villages. The AEWC also monitors and has the primary responsibility for enforcement of the quotas. See S. LANGDON, \textit{Alaskan Native Subsistence: Current Regulatory Regimes and Issues} 38-47 (prepared for Alaskan Native Review Commission, 1984). The federal government also relies on the North Slope Borough's census of bowhead whales for biological information necessary to its management program. Interview with Tom Albert, North Slope Borough (1985).


\textsuperscript{303} D. BOERI, \textit{supra} note 5, at 103-11, 274-80 (whales); S. LANGDON, \textit{supra} note 301, at 42-47 (whales), 48-53 (migratory birds).

\textsuperscript{304} For a history of the AEWC through 1984, see S. LANGDON, \textit{supra} note 301 at 38-47. The system of cooperative management with the AEWC for bowhead whales has been sufficiently successful that the federal government has not felt any need to abandon the arrangement. Similarly, the cooperative system of management for migratory birds has won praise from environmentalists participating in the process. Laycock, \textit{Doing What's Right for the Geese}, 8, \textit{Audubon} Nov. 1985, at 118.

\textsuperscript{305} 50 C.F.R. § 18.23 (1986). The regulations restricting the take of bowhead whales constitute the sole exception. See 50 C.F.R. §§ 230.70-.77 (1986).

\textsuperscript{306} \textit{Id.}
able to prove exactly where a purported game violation occurred. Ideally, state and tribal game laws should track, so that hunters would not be subject to differing rules on either side of jurisdictional boundaries. Game management will be immensely difficult unless tribes and the state can sit down to work out consistent regulations and coordinated enforcement systems. Given these strong inducements to achieving uniform state and tribal rules, the end result of the tribal sovereignty movement in the area of hunting, may ultimately be joint state and village management under rules acceptable to both.

In spite of the legal uncertainty surrounding tribal game regulations, limited geographic extent of tribal jurisdiction, and practical enforcement difficulties created by checkerboarded jurisdictional domains, tribes still may find efforts to write their own hunting codes a valuable exercise. The threat of tribal hunting regulation may be the only way to get the State of Alaska to pay attention to village needs. A serious threat of losing state control over the regulatory process, even if only for limited areas of land, may force the state to take some measures to make its game management more palatable to villagers.

307. Adjacent villages may also want to work together to write consistent codes based on their shared traditions.

308. The process of deciding on a tribal game code may also have value to the village as a means of examining and reaffirming traditional hunting values. See supra p. 230.